United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APRIL TERM, 1937.

No. 7023

Special Calendar

202

UNITED STATES, *ex rel.*, UNITED STATES BORAX COMPANY,
PETITIONER AND APPELLANT,

vs.

HAROLD L. ICKES, Secretary of the Interior,
RESPONDENT AND APPELLEE.

BRIEF OF APPELLANT

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BRIEF OF APPELLANT

Appellant applied to the district court below for a writ of mandamus directing the Secretary of the Interior to issue patent to appellant for eighty acres of placer mining ground. The court refused to issue the writ and this appeal is taken from that ruling.

The Facts.

On May 2, 1925, eight persons located under the placer mining laws the Big Keen No. 2 Placer Claim consisting of approximately 160 acres embracing the

fractionally lotted Northwest quarter of Section 18, T. 11 N., R. 7 W., S. B. M., California. During May and June, 1925, Widdess, one of the locators, for himself and his associates drilled Well No. 47 near the east line of the location to a depth of 430 feet. At the depth of 362 to 430 feet "seams of blue shale were encountered containing a trace of boric acid." (Opinion of Secretary of the Interior, Tr. p. 15.) A blow-pipe test of the material gave the green flame characteristic of the presence of borate mineral. Confident that a sufficient discovery had been made, Widdess *et al.* negotiated a sale of the association location with petitioner, the United States Borax Company, and on January 7, 1926, entered into an agreement with it whereby for a consideration of $75,000.00 for this and other properties, to be paid in instalments and in full on or before January 7, 1927, a deed was to be delivered to petitioner. This deed was placed in escrow but though the purchase price was paid in full January 7, 1927, it was not delivered out of escrow until April 20, 1927 (Tr. pp. 15-16) and on account of a misdescription of the proper base and meridian in the escrowed deed a corrected deed was thereafter executed and recorded in June, 1927. (Tr. pp. 5 and 10.) Upon execution of the agreement the company went immediately into possession of the property and on March 8, 1927, had completed Well No. 62 situated in the SW corner of the location and made a discovery of borate in the form of ulexite which the Government concedes to be valid. (Tr. p. 16.) On July 13, 1927, petitioner filed in the United States Land Office at Los Angeles, mineral application (No. 044266) for a patent. (Tr. pp. 2 and 9.) The Government contend-

ed that all of the original locators were not *bona fide,* since they did not all receive a share of the consideration paid for the deed. It was finally agreed that four of the locators were *bona fide* and petitioner relinquished the north half of the quarter section, whereupon the local officers recommended that patent issue to petitioner for the south half. (Tr. pp. 2 and 9.) Upon the return of the papers to the General Land Office, that office on July 18, 1933, again ordered the matter back to the local office in Los Angeles for further proceedings, claiming that the first well (No. 47) drilled by the original locators in May-June, 1925, did not disclose a sufficient showing of mineral to constitute a valid discovery and that the admitted discovery in Well No. 62 was made by petitioner after the transfer of title to it from the original locators and that therefore it, as an individual, could only perfect title to 20 acres, which area petitioner was given the right to select surrounding its discovery in Well No. 62. (Tr. pp. 2 and 10.) It was to correct this decision of the Secretary of the Interior denying it the right to patent to the 80 acres originally agreed on with the Government's representative that petition for mandamus was filed in the Court below.

The Issues.

The issues are fairly simple and consist of the following:

1. The important consideration for this court to pass upon, assuming that there was not a sufficient discovery in Well No. 47 and involving solely a question of law, is whether the grantee of several association placer mining co-locators who has acquired, prior to

discovery, their undivided interests in the location may thereafter himself make a discovery which will have the effect of validating his title to the entire location even though it exceed twenty acres in total area.

2. A second question, which would only arise in the event the preceding question be answered in the negative, is one of mixed law and fact, and is whether the mineral showing in Well No. 47 drilled in May-June, 1927, prior to the transfer to petitioner, constituted a valid discovery within the meaning of the mining statute requiring discovery.

ARGUMENT AND AUTHORITIES.

A locator of a mining claim has, prior to discovery, a transferable interest.

That a locator of a mining claim on the public domain has, prior to discovery, a substantial interest in the ground which he has located and possessed cannot be successfully denied. The United States, by statute (§2319 U. S. Revised Stats.) has thrown the mineral lands of the public domain open to "exploration" as well as to "purchase"; and, when a qualified locator has entered upon such lands in pursuance of the express invitation of the Government to explore for and discover minerals, he is entitled to protection in doing what the Government specifically says he may do, namely, to "explore" those lands with the object of making a discovery and finding a deposit of mineral.

> "* * * §2319 extends an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits * * *."

Union Oil Co. v. Smith, 249 U. S. 337, 346.

The prospector's possession of the public mineral domain prior to discovery is good as against all the world, and he may invoke the aid of the courts to protect him as against intruders and trespassers on such possession.

Union Oil Co. v. Smith, 249 U. S. 337, 346-8.
Zollar v. Evans, 5 Fed. 172, 173.
Crossman v. Pendery, 8 Fed. 693, 694.
Cosmos Exploration Co. v. Gray Eagle Co., 112 Fed. 4.
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Phillips v. Brill, 17 Wyo. 26, 38.

This principle that an inchoate right to land is a property right to be protected is not a novel one. It has been upheld by the Courts from the very earliest days. See the case of *Delassus v. United States,* 34 U. S. (9 Peters) 116. In that case the question arose as to an incomplete title to certain lands. Chief Justice Marshall in the opinion upholding the right to these lands, said:

> "No principle is better settled in this country, than that *an inchoate title to lands is property.*" (p. 133.)

In a later case, *United States v. Reynes,* 50 U. S. (9 Howard) 126, a similar ruling was made that the term "property" referred to property to which the title

was not yet completed, as well as property to which title was completed. (p. 150.)

The Supreme Court of the United States has many times held that the order in which the acts of location are performed is immaterial.

Cole v. Ralph, 252 U. S. 286, 296.

Union Oil Co. v. Smith, 249 U. S. 337, 347.

The logical result is that by entering upon the land and taking possession of it, the locator has secured an inchoate right which the courts have recognized, and this right of possession pending discovery is a valuable property right which he may sell and dispose of to other qualified individuals. Many courts have recognized this to be the fact.

In the case of *Rooney v. Barnette,* 200 Fed. 700, at page 710, the court said:

> "The location of mineral ground gives to the locator before discovery, and while he complies with the statutes of the United States and the state and local rules and regulations, *the valuable right of possession against all intruders, and this right he can convey to another.*"
>
> (Note: Italics in this brief are ours.)

See also *United States v. North American Oil Co.,* 242 Fed. 723, where the court said, at page 729, speaking of possession of the locator prior to discovery:

> "This right had been recognized by the local courts as *transferable* * * *."

In *Consolidated Mut. Oil Co. v. United States,* 245 Fed. 521 (9th C. C. A.) the court, in discussing this very situation at pages 524-5, said that this right of the locator to maintain possession and

> "* * * *to convey* such possession before discovery, are, * * * rights of value,"

and at page 527 said:

> "* * * they (the co-locators in possession) then had in the lands here in question valuable rights of possession *and conveyance,* which the courts of the country would protect and enforce, and consequently valid rights * * *."

Also see *Alaska Consolidated Oil Fields, v. Rains,* 54 Fed. (2d) (9th C. C. A.), 868, pp. 870 and 871.

The Secretary of the Interior in the opinion here sought to be corrected admits that

> "The right of the locators of an associated placer claim while in actual possession thereof to be protected against intrusions by others *is transferable.*" (Tr. p. 24.)

We have, therefore, no controversy on this point that an individual locator may, prior to discovery, transfer to another whatever interest he may have acquired in the public domain by virtue of his location made in pursuance of the Government's express invitation, and that the grantee may proceed to perfect the inchoate right granted him by making a discovery.

A group of locators of an association placer may, prior to discovery, transfer to an individual these "rights of value" which they have acquired in and to the public domain which they possess and the individual grantee may complete the acts of location by making a discovery which will operate to validate the entire area even though it exceeds twenty acres.

Here we come to the point of divergence between the views of the Land Department and petitioner. The Secretary, in his opinion (Tr. pp. 24-25) states that

even though a locator, prior to discovery, may lawfully transfer his inchoate property right to another, yet it does not follow that the rights of eight locators, as explorers before discovery, may be transferred to an individual. We respectfully challenge the Secretary in this assertion and submit that there is no valid reason which can be advanced which would tend to negative the validity and effectiveness of such transfers to an individual. On the contrary, both logic and authority sustain the proposition that such transfers are eminently appropriate and lawful. If we approach the subject from the standpoint of strict logic, we find that Section 2331 U. S. Rev. Stats. provides that in the case of placer claims "no such location shall include more than twenty acres for each individual claimant." There is nothing in the law, however, which prevents an individual from locating as many twenty acre placer claims contiguous to each other as he desires (except in Alaska), and there is nothing to prevent him from purchasing any number of individual placer mining claims or undivided interests in association placers.

> *Lindley on Mines, Third Edition,* §450, p. 1064.
>
> *Riverside Sand & Cement Co. v. Hardwick,* (N. Mex.) 120 Pac. 323, 324.
>
> *Costigan on Mining Law,* p. 166.

The placer mining laws are not like the homestead and some of the other agricultural land laws in this respect, which prohibit an individual from taking up more than a single holding. There is no policy on the part of the Government or as announced by any court, or any statutory inhibition preventing an individual

from acquiring by purchase all of the placer bearing ground of the public domain that he sees fit to acquire (except in Alaska because of special laws there applicable). The Land Department will readily admit that after discovery an individual may purchase the rights of any or all of the co-locators of an association placer. No persuasive or valid reason can be advanced which would prevent such individual from purchasing the inchoate rights of the association placer locators prior to discovery. No policy of the Government is violated, no rights of individuals are violated. If the association co-locators, prior to discovery, receive valuable consideration for their inchoate undivided interest the law is complied with and the reason for the limitation placed on the area which an individual may acquire in a single location is fully satisfied. Since there is no evasion or breach of the law and its policy, no penalty should be imposed on the *bona fide* purchaser such as the Land Department has inflicted in this instance on petitioner after it paid in good faith a valuable consideration to the association locators for the area in question.

All of the courts which have passed on this very question have held that such transfers prior to discovery are lawful.

Having noted that the logic of the situation is all in favor of upholding such pre-discovery transfers as being just as valid as post-discovery transfers, it is not surprising to find that the courts are in agreement with this conclusion. We have already seen that even the Land Department admits that such pre-discovery transfer may be made by one individual to another in-

dividual where the grantee does not acquire a greater area than twenty acres in a single placer location.

A leading case decided by the Supreme Court of California, a court familiar with mining law problems from the very earliest days of mining in the West, holding that pre-discovery transfers by associated locators to an individual are valid, is:

Miller v. Chrisman, 140 Cal. 440.

The facts are stated in the Opinion:

> "It appears that Miller, his co-locators, and other successors in interest remained in the actual and undisturbed possession of the entire property from the date of their location until the commencement of this action. It appears further that upon the thirty-first day of July, 1897, and *before any discovery of oil had been made, Miller's associates and co-locators executed to him a deed of all their right, title, and interest in the property.* Subsequently, and upon the seventeenth day of September, 1897, Miller executed a lease of the premises, which lease was transferred to the plaintiff Home Oil Company. The Home Oil Company thereupon took possession of the premises, bored for, *and in the month of October, 1897 struck oil and made the first discovery upon the land in question.* Upon this state of facts intervener contends that the location was invalid; that the effect of the conveyance of his co-locators to Miller before discovery operated as an abandonment by them of their location, and destroyed the validity of the whole location; that the validity of the location thus having been destroyed, the subsequent discovery of oil did not, and could not, serve to validate it, and at the most could have given Miller, as the sole remaining member of the association, the right to relocate twenty acres about his discovery.
>
> "Stating the proposition in a sentence it is this: Where a location has been made by associates,

those associates have no right or title which they can convey before the location is perfected by discovery, and their attempt to convey results in an abandonment of their claim, and in the destruction of the whole location. It sufficiently appears from what has heretofore been said that a location such as this, made by eight associates, is but a single location, each associate having an undivided eighth interest in the whole. *It further appears that certain valuable rights become the property of such locators even before discovery.* They have the right of possession against all intruders *(Garthe v. Hart,* 73 Cal. 541), and they may defend this possession in the Courts. *(Richardson v. McNulty,* 24 Cal. 339.) They have then this right of possession and with it the right to protect their possession against all illegal intrusions and to work the land for the valuable minerals it is thought to contain. *We cannot perceive why these rights may not in good faith be made the subject of conveyance by the associates as well before as after discovery.* There is certainly nothing in the expressed law upon the subject to lead to the view that this cannot be done, and there is much to give countenance to the contrary conviction. * * * It is undisputed that when the location has once been perfected one of the associates may by conveyance acquire all of the rights of his fellows, and *we can perceive no reason why the right to prosecute the work and perfect such a location by discovery may not itself be vested in a single one of them.*" (pp. 450-451.)

The Supreme Court of the United States in the case of Chrisman v. Miller, 197 U. S. 313, unavoidably held that the conveyance to Miller by his associate locators prior to discovery was valid.

The Secretary's Opinion seems to take the view that this question was not necessarily before the Supreme

Court of the United States, when the case was there on appeal. (Tr. p. 20.)

We submit that there is no possible escape from the conclusion that the Supreme Court of the United States, by upholding Miller's title, of necessity had to pass on the question as to whether Miller, and through him the Home Oil Company, lessee, could by a single discovery validate the entire 160 acres then vested in Miller. The suggestion is made in the Secretary's Opinion that this contention "was considered by the State Court more particularly in connection with the intervenor's claim." It is true that the intervenor raised in the State Court this question of the validity of such tranfers, but it does not in any degree lessen the fact that fundamentally and solely Miller's title was based upon the pre-discovery transfers to himself by his associates. The Secretary's Opinion questions the appearance of the intervenor on the appeal to the United States Supreme Court. This is immaterial. In the first place the Supreme Court of California flatly based its decision upon this holding that Miller was in possession of the 160 acre tract *as the pre-discovery grantee of his seven co-locators.* The Justices of the United States Supreme Court necessarily read this opinion in the court below and were advised of the facts presented so patently on the face of that opinion. An examination of the statement of fact made by the Supreme Court of the United States (197 U. S., pp. 314-315) will indicate that the latter court was well aware that this question was in the case. This statement of fact recites that:

> "Miller and seven others, duly qualified to make entries, *made a mineral location* of the entire tract. Subsequently all interests obtained thereby were vested in the plaintiffs, defendants in error."

Paragraph X of this statement of fact recites that *thereafter the Home Oil Company made a discovery.* Therefore, the Supreme Court of the United States, by its own statement of facts, recognized that this question was necessarily presented to it and unavoidably involved on the appeal.

An examination of the record of the case before the Supreme Court of the United States will also establish the fact that this question was not only thus recognized by the court as being in the case, but was actually presented to that court in all of its details. The briefs filed in the United States Supreme Court show that this question was raised and strenuously urged upon the court by the unsuccessful party. The transcript of the record in that case and the specifications of error repeatedly urge upon the Supreme Court a determination of this very question. (See particularly pages 132 and 133 of the Transcript of Record, paragraph 15, and Brief of plaintiffs in error (the unsuccessful parties), pp. 3, 4 and 5, paragraph 13, pp. 63.6, 64 and 89.)

Counsel for the successful party devoted nearly thirty pages of his brief, consisting of one hundred pages, to this very point. (See pp. 74-100 inclusive and particularly pages 93-95, brief of defendants in error, submitted by L. L. Corey.) The point was again raised in another brief filed by plaintiffs in error in opposition (p. 4, paragraph 5, and pages

14-15, paragraphs 3 and 4). In the reply brief of plaintiffs in error for the unsuccessful parties (pp. 7 and 8, 17) the same point was again squarely raised and presented.

There can be no escape, therefore, from the conclusion that the Supreme Court of the United States necessarily passed upon this very question in coming to its conclusion in affirming the judgment of the Supreme Court of California. In view of the fact that this question was directly involved in the case and could not be avoided in arriving at a decision and that the Supreme Court of the United States, having before it the opinion of the Supreme Court of California, affirmed the latter opinion, awarding the successful party the full 160 acres there involved, *it must inevitably result that the Supreme Court of the United States was satisfied with the rule announced by the Supreme Court of California and considered it unnecessary to comment directly* upon a question which was so flatly decided by the court below *and in opposition to which no valid reason can be advanced.*

The Supreme Court of the United States has a second time had before it the same situation and yet there is not one word of disapproval in the opinion of the doctrine here asserted to be the correct one.

This case was first decided by the Supreme Court of California in *Smith v. Union Oil Co.*, 166 Cal. 217. In that case plaintiff and defendant were each claiming under identical situations, namely, a placer location made by eight qualified persons of a quarter section subsequently conveyed, so that title of these

association locators, prior to discovery in each case, became vested in a single individual. The plaintiff below was in possession of the tract in question. (See facts recited in the opinion, pp. 219-220.) The defendant below, Union Oil Company, claimed under a statute commonly known as "The Five Claims Act" (32 Stats. 825), which act conferred upon locators owning five contiguous placer oil claims the right to perform annual labor or assessment work upon one of the group and thus benefit the entire group. The Supreme Court of California held that this act was not intended to apply to mining claims prior to discovery and, therefore, could not be invoked by defendant, Union Oil Company, which was out of possession. *Judgment for the entire 160-acre tract embraced in the location* was given plaintiff Smith, who was in possession of the land in question. The case was appealed to the Supreme Court of the United States. *(Union Oil Co. v. Smith,* 249 U. S. 334.) The court, in its statement of fact contained in its opinion, notes the conveyance by the co-locators *to one of their number prior to discovery* and makes the following comment on this factual situation:

> "It will be observed that both parties are in the position of prospectors or explorers upon the public domain—*locators without discovery* * * *." (p. 343.)

Therefore, the court, by its own statement, had before it the identical situation which is presented to this court in the instant case. It is, therefore, interesting to note that the court calls attention to the "express invitation" extended by Section 2319, Rev. Stats., to all qualified persons to explore the lands

of the United States for valuable mineral deposits and states that such persons

> "* * * are not treated as mere trespassers, but as licensees or tenants at will." (p. 346.)

The court comments on the necessity for this occupation of the land in order that there may be "adequate and systematic exploration." The court then declares that the order in which the acts of location takes place is not essential, provided the rights of third parties do not intervene. (p. 347.) It recognizes

> "* * * *the authority of the mining States to regulate the possession of the public lands* in the interest of peace and good order." (p. 348.)

It adds that a discovery by a qualified locator "initiates rights much more substantial" than is the situation prior to discovery (p. 348), thus, by inference, intimating *that the qualified locator has substantial rights even prior to such discovery.* The Supreme Court of the United States affirmed the conclusion of the Supreme Court of California and the judgment rendered below in favor of Smith, the plaintiff, *for the entire 160-acre placer location,* (p. 353) even though Smith was only in possession without a discovery.

This case adds further confirmation, if such confirmation were necessary, to the case of *Miller v. Chrisman* previously noted, and upheld by judgment the right of a qualified locator to the possession of 160 acres embraced in an association placer claim originally located by eight individuals, even though no discovery had taken place. Surely, if the law is as the Secretary contends, the Supreme Court of the United States would not have sanctioned such a

flagrant violation of the mining statute as the Secretary has held this situation to be, but would have given some intimation that Smith was claiming 140 acres more than he was entitled to under the mining laws, and that as an individual he could only possess lawfully 20 acres prior to discovery of mineral. There is no escape from the fact that both the California and the United States Supreme Court assumed throughout in both cases that possession by an individual of the entire 160 acres under conveyance from the original locators prior to discovery was lawful and not in violation of the mining statute. The situation was squarely presented on the facts recited by the courts in their respective opinions and the only conclusion that can be drawn from the utter failure of the Supreme Court of the United States to comment adversely on the situation is that the situation has received its unqualified sanction.

The Chrisman-Miller and Smith-Union Oil cases are authority for the principle that pre-discovery transfers of association placers to an individual are lawful.

In the court below counsel for the Government cited the case of *Webster v. Fall* (Secretary of the Interior), 266 U. S. 507, 511, in support of their contention that, because the opinion did not in so many words discuss this question, the Chrisman-Miller case may not be used as authority for the proposition that conveyances of an association placer location prior to discovery to an individual are legal, in spite of the fact that this identical situation was squarely presented to the court by the facts and there argued.

The court in the Webster-Fall case said:

> "* * * The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions *which merely lurk in the record,* neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." (p. 511.)

The Webster-Fall case may not be compared to the Chrisman-Miller case, for instead of "merely lurking in the record' the question here at issue was squarely presented to the Supreme Court in the Chrisman-Miller case in all its phases and large portions of the briefs of both parties devoted to it. An inspection of the transcript and briefs will establish the fact that the question was repeatedly raised and also made practically the sole basis for a petition for a rehearing.

As a matter of fact if we examine the authorities cited in the Webster-Fall case in support of the statement there made with reference to "Questions which merely lurk in the record," we find strong support by implication for the principle here contended for, namely, that if the question at issue has been called to the attention of the court, especially if it has been fully presented and repeatedly argued, the decision becomes a binding precedent on that particular state of facts.

See

New v. Oklahoma, 195 U. S. 252, 256;
Tefft, Weller & Co. v. Munsuri, 222 U. S. 114, 119;
The Edwards Case, 1 Wheaton 261, 275-6.

In the case of *"Cliquot's Champagne"* 3 Wall. (70 U. S.) 114, the Supreme Court of the United States commented on the fact that though the federal trial courts had instructed juries as to the applicability of a certain federal statute this had been assumed to be the law when the cases come up on appeal. The Supreme Court said:

> "* * * In none of these cases was the point here under consideration *expressly* made. The applicability of the rule alike in cases arising under *all the revenue laws* was assumed by the eminent counsel concerned and by the court. Other questions relating to the subject were fully discussed. *This tacit recognition is equivalent to an express declaration.*" (p. 144.)

Also in the case of *Fidelity & Deposit Co. v. United States,* 187 U. S. 315, the Supreme Court of the United States referring to a decision by this Court of Appeals said:

> "The case is questioned as authority because, it is said, that 'if this court upheld a rule of such important character and doubtful validity it would give the grounds of its decision.' But the objection assumes that the court had doubts. The better inference is that the court regarded the grounds of challenge to the validity of the rule as without foundation. And its validity was challenged and necessarily passed on, which disposes of the contention that the decision was based on another point." (p. 319.)

In *Grubb v. Public Utilities Comm.,* 281 U. S. 470, 477-8, the court said:

> "* * * The question of the constitutional validity of the order was distinctly presented by the appellant's petition and necessarily was resolved against him by the judgment affirming the order.

> Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it." (pp. 477-8.)

While the foregoing was a case involving the *res adjudicata* and not the *stare decisis* principle, the language used by the court is particularly applicable here.

We are further confirmed in our contention that the Chrisman-Miller and Union Oil-Smith cases should be treated as precedent on the point in issue by reference to the decisions of some of the lower Federal and State Supreme Courts.

In *United States v. Interstate Commerce Com.,* 8 Fed. (2d) 905 (Court of Appeals of District of Columbia), Martin, C. J., said at page 906:

> "It is said by the appellant that the question of certiorari was not given serious consideration, either by the court or counsel, in the former proceedings. This, however, does not alter the situation, for the question was expressly raised in the case, and it was not reserved out of the judgment. It must therefore be considered as adjudicated therein." (p. 906.)

In the case of *Mulford v. Estudillo,* 32 Cal. 131, the court said at pp. 137-8:

> "* * * the circumstance that a material fact appearing in the record is not recited among other facts which are stated in the opinion, does not tend to show that such fact was not considered by the Court, and its due value assigned to it. The presumption is the same, whether all, or a part or none of the facts are mentioned in the opinion, and that is, that all the facts in the record, bearing on the points decided, have received due consideration." (pp. 137-8.)

In *Hogan v. Board of Education,* 200 N. Y. 370; 93 N. E., 951, at p. 952 the court said:

> "* * * The opinion must be interpreted as a whole, and whatever was said must be tested by reference to the actual question then before the court."

If we apply this test we cannot escape the conclusion that the Supreme Court in the Chrisman-Miller case, as evidenced by its very statement of the facts, was fully aware of the question presented by those facts and, by deciding the case as it did, intended to place its stamp of approval on the legal situation so presented.

In *Moriarity v. City of New York,* 116 N. Y. Supp. 323, it was said:

> "A decision must be tested and interpreted *as based on and applicable to the state of facts stated in the opinion,* * * *."

And in *People v. Hennessy,* 206 N. Y. 750; 100 N. E. 407, the court said at p. 408:

> "An opinion does not always state all that is decided, and it should be read in the light of what is necessarily involved in the judgment as made." (p. 408.)

Also see *Second Nat. Bank v. McGehee* (Texas), 241 S. W., 287, where the court said at p. 292:

> "The conclusion is irresistible that the Supreme Court has twice had this issue squarely before it. In each instance it is equally plain, that, although the statute was not discussed, nor even expressly mentioned, it has in effect so interpreted the statute as to find it no insuperable obstacle to the rule announced in the Van Winkle Gin Case."

We can also state with equal force that the question here at issue has been twice squarely before the Supreme Court in the Chrisman-Miller and Smith-Union Oil cases and, though the court did not discuss or expressly mention the legal principle involved in its opinions in either of these cases, it in effect so interpreted the law, otherwise the conclusions there reached upholding the judgments of the courts below based on such facts and awarding 160 acres to an individual in each instance could not have resulted.

The California Supreme Court has reaffirmed the doctrine announced in the Miller-Chrisman and Union Oil cases.

In the case of *Merced Oil Co. v. Patterson,* 153 Cal. 624, a similar situation was presented and the court discussed the Miller-Chrisman case again reaffirming the doctrine that conveyances could be made by the associates in a 160-acre placer location without destroying or impairing the right of possession which they enjoyed in common, and that such transfers were "*permissible and legal.*" (pp. 626-627.)

This case came before the same court on a second appeal (162 Cal. 358) where the court again stated that in the former case—

> "It was squarely held that such a conveyance is operative to give to the grantee all the rights which the grantors formerly held in the land covered thereby, * * *"

and the court went on to hold (pp. 360-362) that a conveyance could be made to an outsider as well as to one of the original associated locators, the court saying—

> "* * * we see no difference in principle * * *. It is likewise to be noted that in affirming the judgment of this court in Miller v. Chrisman (140 Cal. 440) *the Supreme Court of the United States said nothing inconsistent with what had been said* by this court on this question." (Chrisman v. Miller, 197 U. S. 313.)

Federal courts have also recognized this doctrine.

The case of *United States v. North American Oil Co.*, 242 Fed. 723, cites the Miller-Chrisman case with approval and referring to the right acquired by locators prior to discovery holds that "this right had been recognized by the local courts as transferable." (p. 729.)

See also *United States v. Stockton Midway Oil Co.*, 240 Fed. 1006, where the court commented on the rights prior to discovery which "*judicial decisions*" had given the locators. Both of these cases have been criticized by the Secretary in his Opinion (p. 16) on the ground that "such transfer was validated by the Act of March 2, 1911" (commonly referred to as the Pickett Act). (36 Stat. 1015.) In answer to this criticism of these cases it will be noted that the court in the North American Oil case takes the view that similar legislation by Congress was

> "* * * in recognition and confirmation of their rights (locators in possession prior to discovery) as recognized by the local laws and the moral obligation of the Government." (242 Fed. p. 729.)

and in the Stockton Midway case the court refers to the rights of oil locators prior to discovery "that *judicial decisions* had given them" and adds that—

> "*There is no inference to be drawn, however, that Congress, legislating as it then was as to*

withdrawals and in aid of the proprietary rights of the government, was intending to confer any additional rights, particularly as against the government, upon those claiming, without a discovery, land withdrawn by competent authority.'' (240 Fed. p. 1009.)

It savors of irony for the Land Department to urge that the Act of March 2, 1911, was essential to give the individual transferee any rights under a situation of this sort, because this Congressional legislation was brought about by its own decision in what is known as the Yard case, which we will comment upon later on herein. The Yard case held that there could be no transfer by the locators to an individual prior to discovery and it was to correct this misconstruction of the law that Congress was impelled to pass the Act of March 2, 1911, and thus protect those rights which the courts had already declared were possessed by such individual transferee prior to discovery.

The Land Department has made a similar erroneous ruling regarding oil lands which the courts distinctly held to be an incorrect interpretation of the existing law and which was cured by Congressional action.

This situation is almost identical with a similar situation created by the Land Department, which is commented upon in *Union Oil Co. v. Smith,* 249 U. S. 337, at pp. 345-6, where the court calls attention to the fact that the Land Department in Union Oil Co., 23 L. D. 222 (revoked on review 25 L. D. 351) decided that petroleum was not one of the minerals contemplated by the provisions of the Mining Act. The court said:

> "It was in order to obviate the effect of the former of these two decisions that Congress passed the act of February 11, 1897",

which was an act specifically authorizing the locating of lands containing petroleum under the mining laws and including lands theretofore located. This erroneous interpretation of the Land Department is further commented on in *Burke v. Southern Pacific Co.*, 234 U. S. 669, at page 679, where the Supreme Court of the United States again calls attention to the fact that the Land Department's ruling in this respect was the "single exception" to the uniform rulings that such lands were regarded as mineral.

The Act of March 2, 1911, was passed for similar reasons and had it not been for this erroneous construction of the mining law by the Land Department in the Yard case such legislation would never have been thought of or required, because the courts of the Western States had already declared this rule of property and it was already the law. The Public Lands Committees of the House and the Senate, through their respective Chairmen, reported this proposed legislation to the House and Senate respectively, stating:

> "In the development of oil in California it has been the almost universal practice for the eight locators to form a corporation and convey their claim to it. * * * *This practice was not objected to by the department and many patents were issued to the grantee of the locators.*
>
> "But about two years ago the department had occasion to examine the law very critically in a case where one H. H. Yard had with seven associates located a very large amount of land alleged to contain gold, but being covered with good timber. The seven associates conveyed their in-

terests to Yard before actual discovery of gold on each claim, and the department held that such conveyances carried no title to the land, because a 'mining claim' was not a real claim and a tangible thing capable of conveyance till actual discovery of the mineral.

"This new interpretation of the law found numerous oil companies with claims on which they had expended large sums of money in drilling for oil—sometimes from $20,000 to $50,000—but where they had taken conveyance from the locators before actual discovery or the completion of the first well. This bill aims to relieve these companies by allowing them to take title the same as if the conveyance had been made after discovery."

(61st Congress, 3rd Session. House of Representatives Report No. 2075; Senate Report No. 1179.)

Also see Congressional Record, Vol. 46, page 2095, where Congressman Smith, who reported the bill from the Committee to the House, stated that it was in order to protect the rights of

"* * * those who had made placer mining entries and conveyed them to a corporation or to another party before the discovery * * *."

See also the remarks of Representative Mondell to the same effect, stating that the validity of such a situation had never been raised "in all the history of our Government until the Yard decision a few days ago." *(Congressional Record,* Vol. 46, p. 2095.)

Also see the remarks of Congressman Needham, who said

"This legislation simply carries out the policy which has been going on for years and which oil operators and locators have relied upon in good faith." *(Congressional Record,* Vol. 46, p. 2097.)

Senator Flint, during the Senate debate, stated that the bill was to make a correction in a decision rendered by the Department, referring to the Yard case. *(Congressional Record,* Vol. 46, p. 3410.)

It will be noted from the foregoing that *the Department, prior to its Yard decision, agreed with the views unanimously held and announced by the courts.* As will be pointed out more fully hereinafter, Congressman Smith and Senator Flint put their fingers on the illogical basis for the Yard case when they pointed out that the Department had held a "mining claim was not a real claim and a tangible thing capable of conveyance till actual discovery of the mineral." This is not the law. The courts all hold otherwise. The Land Department itself, as has been pointed out, now admits that such a location is transferable prior to discovery, but limits such conveyances to those from one individual to another individual. And yet the Department still cites its Yard and Bakersfield Fuel Oil decisions as authority for its contention that an individual may not lawfully take conveyances from more than one locator, when *according to its own present admission* these cases are each based on an admittedly erroneous premise.

These repeated decisions of the Federal and State Courts holding that pre-discovery transfers to an individual are lawful have given rise to a rule of property in the mining states which may not be overturned by the dissenting opinion of the land department alone.

We have already seen that the Supreme Court of the United States has recognized

> "The authority of the mining States to regulate the possession of the public lands in the interest of peace and good order."
>
> *Union Oil Co. v. Smith,* 249 U. S. 337, 348.

The case of Farrell v. Lockhart, 210 U. S. 142, at page 146 also bears upon this question. The Supreme Court of the United States had, in the earlier case of *Lavignino v. Uhlig,* 198 U. S. 443, decided that where three rival locations were made in the order of time, A, B and C, that even though the B location were made when the A location was still alive, it would prevail over the C location made after title to the A claim had terminated either by abandonment or forfeiture. In the Farrell-Lockhart case, however, the court's attention was called to the fact that the Lavignino-Uhlig decision did not conform to the interpretation of the mining act in this respect by the courts of the mining states in the West. On this point the court said, in *Farrell v. Lockhart,* the following:

> "In the argument at bar our attention has been directed to several decisions of the highest courts in some of the mining States or in Territories of the United States where mining prevails —*Nash v. McNamara* (Nevada), 93 Pac. Rep. 405, and cases cited—which, in considering the reasoning of Lavignino v. Uhlig, also attributed to that reasoning, broadly construed, the serious and unfavorable consequences on rights of property suggested by the court below in its opinion." (p. 146.)

Later on in its opinion the court again comments on "the experience of the courts referred to concerning the practice which it was declared had prevailed," and without inquiring into "the inherent cogency"

of its reasoning in the *Lavignino vs. Uhlig* case, the Supreme Court of the United States gracefully reversed its rule of law as announced in that case and re-established the rule adhered to by the State courts even though the federal public domain was involved.

See also the case of *Francis v. Francis,* 203 U. S. 233, which involved the interpretation of an Indian Treaty between the United States and the Chippewa nation of Indians. The question arose as to the character of the Indian title to certain lands. The court held:

> "That question was under consideration in the Courts of Michigan a long while ago and was answered in the affirmative, and it would seem that their construction of the provisions in question has become a rule of property in that state" (p. 238),

and the court based its decision upon

> "The construction of the treaty here involved"

which

> "has become a rule of property in the state where the land is situated." (p. 242.)

Here we have a construction of a Federal treaty by a State court, which is recognized by the United States Supreme Court as having become a rule of property in that State.

A somewhat similar situation arose in the case of *Nadal v. May,* 233 U. S. 447, where the validity of title to land in Porto Rico was involved. An interpretation of the Federal act in question had been decided twice by the Supreme Court of Porto Rico and the Supreme Court of the United States had "assumed" that this interpretation was correct, a situation very

similar to that presented in the *Chrisman v. Miller* case. The court went on to say:

> "It is impossible to know how many or how important transactions may have taken place on the faith of these repeated solemn assurances, and apart from the general unwillingness of this court to overrule the local tribunals on matters of purely local concern, *Santa Fe Central Ry. Co. v. Friday,* 232 U. S. 694, 700, it is not too much to say that the decisions have become a rule of property * * *." (p. 454.)

Therefore, we have repeated recognition by the Supreme Court of the United States, even to the extent of reversing itself in the *Lavignino-Uhlig* case, that the decisions of the courts in the mining states may establish rules of property with respect to the public domain. And how much stronger is our position where the Supreme Court of the United States has tacitly affirmed these decisions by the State Courts on this point!

The Yard case and the Bakersfield Fuel and Oil Co. case.

These cases decided by the Secretary of the Interior are relied upon as authority in the Secretary's Opinion now before this Court. They are opposed to all of the decisions by State and Federal courts, including the tacit approval by the Supreme Court of the United States, as already noted. The Yard case is found in Volume 38 of the Land Decisions, page 60. That case involved the fraudulent attempt on the part of one H. H. Yard to claim several hundred thousand acres of land which had been included in national forest reservations, by locating them as min-

eral lands in 160 acre association placer claims. A very small portion of that lengthy opinion was devoted to the question here under discussion. The opinion itself shows that *no valid discovery had ever been made by Yard,* or anybody else connected with the locations. (See page 70.) The lack of a valid discovery was urged as one of the reasons for arriving at the conclusion that the locations were invalid. The fact that there were other reasons in the mind of the Secretary for upholding the decision is evident from the fact that Yard was not even given the right to select a twenty acre tract surrounding any future discovery point. It is evident from a reading of this opinion that it could have been based just as well upon lack of discovery and fraudulent design to obtain Government lands unlawfully.

The *Bakersfield Fuel and Oil Co.* case, 39 L. D. 460, is also cited by the Secretary as authority. This case flatly presents a situation similar to the one at bar, but the decision in that case is based upon the authority of the Yard case, already noted. The Secretary in the "Bakersfield" decision says:

> "Until discovery is made they (the locators) acquire no interest in the public domain and have nothing to convey."

We have already seen that this is an erroneous conception of the law and that all of the courts, Federal as well as State, hold and admit that prior to discovery a locator has an interest which he may convey. The Secretary of the Interior in the case here involved, as already noted, now expressly admits the right of a locator to convey prior to discovery, *thus expressly repudiating the erroneous announcement in*

the Bakersfield case that the locator prior to discovery has "nothing to convey." (Tr. bottom p. 24.) Is it strange then that the Land Department in the Bakersfield case, having started out with the erroneous assumption that a locator prior to discovery has "nothing to convey", should have also erroneously extended that assumption so as to deny the right of eight locators prior to discovery to convey to an individual grantee? The *Bakersfield Fuel and Oil Co.* case was not carried any further and no resort was had to the courts to correct the Secretary's erroneous ruling, because the case was decided by the Secretary January 19, 1911, and Congress, on March 2, 1911, had passed the legislation specifically authorizing such transfers in the case of oil lands. The act of Congress was generally recognized to be merely a legislative act designed to correct and cure an erroneous ruling of the Secretary of the Interior in the Yard case, and consequently, the Bakersfield Fuel and Oil Company had no occasion to press the matter further.

How much stronger then is the case here brought before this court where the Land Department alone differs from the unanimous opinion of all of the courts, State and Federal, (including the tacit sanction of the Supreme Court of the United States), which have spoken upon this subject of the lawful transferability of the possessory rights of the association locators to a single grantee prior to discovery.

And particularly is this so where the Land Department, in the opinion of the Secretary now under review by this court, expressly admits that the indi-

vidual locator prior to discovery has an inchoate right which he may lawfully transfer, thus repudiating the Bakersfield case which says he has "nothing to convey." The Department at this late date admits its earlier error and comes part way as far as individual rights are concerned, but will not come the whole distance where rights acquired by a single transferee from several co-locators are involved.

The decisions of the Secretary of the Interior on questions of law are open to review by the courts.

The Secretary takes the position that even assuming that the Land Department's ruling on this question of law be mistaken, nevertheless, petitioner may not question such erroneous holding. (Tr. p. 31.) It would be a travesty on justice if this were so. Surely there is some way of reaching a faulty conclusion of an administrative officer on a pure question of law and preventing the manifest injustice which must result here, especially where petitioner has paid out large sums of money in good faith in the acquisition of the property in question. Otherwise, the Land Department becomes "a law unto itself", from whose decisions there is no appeal and no method of correction. Many cases can be cited where the Secretary's rulings have been held to be final, but an examination of such cases will indicate that they either involved the determination of questions of fact or were cases where the courts appealed to agreed with the Department in its construction of the law, or were procedural cases involving the right of the Secretary to establish rules of procedure governing matters coming before the Land Department in pur-

suance of Acts of Congress giving it jurisdiction and where, manifestly, it has the power to prescribe such rules.

The courts have uniformly held that though the decisions of the Land Department on questions of law are entitled to respectful consideration, nevertheless, it is only when such decisions conform to the law as it should be interpreted that they have controlling weight. Wherever, as in the case at bar, the ruling of the Land Department, on a question of law, is opposed to its construction by State and Federal Courts, especially where such construction has received the tacit approval of the Supreme Court of the United States on more than one occasion, the ruling of the Land Department may be overturned.

An able discussion of this subject is found in Lindley on Mines (3rd Ed.) Sec. 666.

Judge Lindley concludes that the courts are not bound by departmental decisions on questions of law:

> "* * * where the land officers have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief. Therefore, the construction of the law by the Department, as applied to the facts found by them to be true, does not conclude the courts." (Lindley on Mines, pp. 1664 and 1665 and cases cited, many of them by the Supreme Court of the United States.)

The case of *Wilbur, Secretary of the Interior v. U. S. ex rel. Krushnic,* 280 U. S. 306, 318-319, is particularly in point. There an association placer had been located October 1, 1919, and patent applied for. The

Commissioner of the General Land Office and the Secretary of the Interior on appeal had held that sufficient assessment work had not been done in 1920 and that the Leasing Act of 1920 passed by Congress had extinguished all right to the claim, hence that work could not be resumed so as to revive the claim under the provisions of the general mining law and thus to place it in good standing again.

However, the Supreme Court of the United States said:

> "* * * We are of opinion that the Secretary's decision to the contrary violates the plain words of the excepting clause of the Leasing Act.
>
> "2. While the decisions of this court exhibit a reluctance to direct a writ of mandamus against an executive officer, they recognize the duty to do so by settled principles of law in some cases. *Lane v. Hoglund,* 244 U. S. 174, 181, and cases cited. In *Roberts v. United States,* 176 U. S. 221, 231, referred to and quoted in the Hoglund case, this Court said:
>
> " 'Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is

plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.'

"See also Ballinger v. Frost, 216 U. S. 240, 250.

"*In this case, the Secretary interpreted and applied a statute in a way contrary to its explicit terms, and in so doing, departed from a plain official duty. A writ of mandamus should issue directing a disposal of the application for patent on its merits, unaffected by the temporary default in the performance of assessment labor for the assessment year 1920;* and that further proceedings be in conformity with the views expressed in this opinion as to the proper interpretation and application of the excepting clause of the Leasing Act of February 25, 1920, and of §2324, Revised Statutes of the United States. A writ in that form follows the precedent established by this Court in respect of the writ of injunction in *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 238 and *Payne v. New Mexico*, 255 U. S. 367, 373, as being better suited to the occasion than that indicated by the District Court of Appeals. As so modified the judgment of that court is *affirmed*" (pp. 318-319).

A somewhat similar situation was presented in the case of *Ickes, Secretary of the Interior, vs. Virginia-*

Colorado Development Corporation, 295 U. S. 639. In that case certain oil shale placer locations had been made in 1917. Annual assessment work was done up to and including July 1, 1930, but it was not performed for the year ending July 1, 1931. The Secretary of the Interior ordered adverse proceedings to be initiated by the Land Department, claiming that the title to these claims had become thereby terminated and that the Leasing Act of 1920 had the effect of preventing the locators from resuming work and placing the title in good standing again. The Secretary of the Interior decided that the claims were void and the mineral claimants brought a suit for a mandatory injunction against the Secretary to have his decision declared void and the adverse proceedings vacated. The court bases its conclusion largely upon the *Wilbur v. Krushnic* case, *supra.* It held the Secretary's action in this respect to be in excess of his authority and even though, in the opinion in the *Wilbur v. Krushnic* case, there was an intimation that the United States might on its own behalf challenge the valid existence of a mining claim, the Supreme Court held that even the Government itself could not under these circumstances successfully maintain such challenge (pp. 646, 647). When this case was in the Court of Appeals of the District of Columbia below, Chief Justice Martin came to the same conclusion and held that a writ of mandamus against the Secretary was similar in principle to a writ of mandatory injunction, "to afford similar relief based upon similar facts" (p. 125).

The case of *United States v. West,* 30 Fed. (2d) 742, decided by the late Justice van Orsdel of this

Court, is particularly illuminating. Speaking for the Court he says:

"We come now to the usual objection presented by the department, namely, the jurisdiction of the court to compel the Secretary by writ of mandamus, to issue a patent. In this case the court is not invading the exclusive jurisdiction of the Secretary to determine discretionary questions of fact, nor his interpretation of the meaning of a law upon which the exercise of his discretion depends. In the present case, with the facts conceded, nothing remains to be done by the Secretary but the performance of the mere ministerial act of issuing a patent; and if, as in the present case, the Secretary misinterprets his statutory duties in conformity with the facts, it is well within the power of the court to place its interpretation upon the law and direct the Secretary to act in accordance therewith. Perhaps the power of the court, in cases of this character, to control the acts of an executive officer by mandamus, is best expressed in Roberts v. United States, 176 U. S. 221, 20 S. Ct. 376, 44 L. Ed. 443, where the court, speaking through Mr. Justice Peckham, said:

" 'Unless the writ of mandamus is to become practically valueless, and is to be refused, even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to

perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required' " (pp. 746-747.)

He also cites many other cases decided by the Supreme Court of the United States bearing on this same question, upholding the power of the court to issue its writ of mandamus against the Secretary under similar circumstances.

In no case which has come to our observation has this writ been denied where the Secretary has plainly misconstrued the law and refused to issue a patent on this ground as in the case at bar. The Government can cite any number of cases where the Secretary has a plain discretion, such as those of fact, questions of policy, questions of procedure in his own department, etc., etc., but when it comes to a question of law pure and simple such as the interpretation of the mining statute here involved and the rights of those proceed-

ing in good faith under that statute, the Secretary has always been held to be subject to the mandatory direction of the Courts.

Discovery in Well No. 47.

The Secretary has decided that the showing in Well No. 47, though for nearly a hundred feet in the lower portion of the well seams of blue shale containing a trace of borax as shown by the green flame test were encountered, does not constitute a valid discovery. While this question as to whether a discovery exists in a particular case is a mixed question of fact and law (See *Stewart Mining Co. v. Ontario Mining Co.*, 237 U. S. 350, 356, where a similar question as to the existence of the apex of a vein arose), nevertheless, we appreciate that it may be held not properly questioned on this appeal.

Still, we call the Court's attention to this showing in Well 47 made by one of the original locators, Widdess, in his own behalf and that of his co-locators long prior to any transfer of title, because it was on the strength of this showing that Rasor, representative of petitioner, became interested in the property and in behalf of the company agreed to purchase this 160 acre parcel for a valuable consideration. It shows the entire good faith of petitioner, which must always be given consideration under these circumstances. We particularly call the Court's attention to the facts recited in the Secretary's opinion, found at pages 27-30 of the transcript, to substantiate our statement that Mr. Rasor was thoroughly justified in believing that a valid discovery had been made on this quarter

section prior to any transfer of title by the original locators.

In conclusion we respectfully submit that a gross injustice will be done petitioner if it is not allowed a patent for the eighty acres which was agreed upon by counsel representing the Land Department as being represented by *bona fide* locators and upon whose recommendation the local officers held that said eighty acres should be patented to petitioner. The writ of mandamus should issue as prayed for.

Respectfully,

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No. 7023

In the United States Court of Appeals for the District of Columbia

APRIL TERM, 1937

SPECIAL CALENDAR

UNITED STATES EX REL. UNITED STATES BORAX COMPANY, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLEE

BRIEF OF APPELLEE

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HARRY M. EDELSTEIN,
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In the United States Court of Appeals for the District of Columbia

APRIL TERM, 1937

No. 7023

SPECIAL CALENDAR

UNITED STATES EX REL. UNITED STATES BORAX COMPANY, APPELLANT

v.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, APPELLEE

BRIEF OF APPELLEE

INTRODUCTORY STATEMENT

The petitioner appeals from a decree of the district court *per* Justice O'Donoghue, which overruled the petitioner's demurrer to the appellee's return and answer, and petitioner having elected to stand on its demurrer, dismissed its petition for a writ of mandamus. The writ sought was one to compel the appellee to issue to appellant a patent for eighty acres of land under the mining laws instead of the twenty acres allowed by the appellee.

THE FACTS

The 80 acres of land involved consist of the south half of two contiguous lots in California. On May 2, 1925, one Widdess and seven others located a 160-acre tract of which said 80 acres were a part. (R. pp. 2, 9, 14, 15.) Widdess and his seven associates thereafter sold their interest in the location to the appellant. This sale was effective on January 7, 1927. (R. pp. 4, 27.) For reasons not material to this case, the appellant relinquished its claim to half the 160-acre location. (R. pp. 14, 15.)

The appellant has heretofore claimed two discoveries of borate mineral as basis for its application for a patent, one in Well No. 47 and the other in Well No. 62. Concededly there was a valid discovery in Well No. 62 on March 8, 1927, after appellant acquired the interest of Widdess and his associates in the location. (R. p. 16.) The appellant has also claimed that Widdess and his associates made a discovery in Well No. 47 during May and June of 1925, prior to the transfer. But appellee found there was no such discovery and the appellant in effect now concedes that this finding of fact may not be questioned. (R. pp. 27–30. Appellant's Brief p. 40.)

On December 5, 1936, the Secretary of the Interior affirmed a decision of the Commissioner of the General Land Office, denied the application for a patent as to 60 acres and granted it as to the 20 acres surrounding the discovery in Well No. 62.

(R. pp. 14–31.) In his decision the Secretary held that there was no discovery in Well No. 47; that the only discovery was in Well No. 62; that the latter discovery having been made after the transfer by the eight associates, the appellant could receive a patent for only 20 acres, the limit allowed an individual owner of a perfected location; that a placer location for 160 acres made by eight persons and transferred to a single individual or corporation before any discovery had perfected the location, could not be perfected by the transferee upon one subsequent discovery for the full area so located, but only as to 20 acres surrounding the discovery. (R. pp. 14–32.) On February 8, 1937, the Secretary denied a motion for rehearing. (R. pp. 31, 32.) Appellant then filed its petition for a writ of mandamus to compel the issuance of a patent for the entire 80 acres. (R. pp. 1–8.) Appellee filed an answer and return to the rule to show cause. (R. pp. 8–32.) Appellant demurred to the answer and return. (R. p. 33.) The court below overruled the demurrer and appellant having elected to stand thereon, dismissed the petition without opinion. (R. p. 34.)

THE ISSUES

1. Did the Secretary correctly decide the question of law whether under the mining statutes of the United States the single transferee of a pre-discovery association placer location, who thereafter makes a single discovery, is entitled to a pat-

ent for more than 20 acres surrounding such discovery by holding that the transferee may receive a patent for only such 20 acres?

2. Assuming for the sake of argument that the decision of the Secretary was not correct, should the writ of mandamus issue to compel him to issue a patent for 80 acres?

The brief of the appellant states as its first issue one which is similar to appellee's first issue. It continues:

> 2. A second question, which would only arise in the event the preceding question be answered in the negative, is one of mixed law and fact, and is whether the mineral showing in Well No. 47 drilled in May–June, 1927, prior to the transfer to petitioner, constituted a valid discovery within the meaning of the mining statute requiring discovery. (Appellant's Brief p. 4.)

But at the end of the brief there is in effect a concession that the finding of the Secretary that there was no such valid discovery may not be questioned. (Appellant's Brief p. 40.) Whether there was a valid discovery in Well No. 47 is therefore in no event material on this appeal.

ARGUMENT

1. The decision of the Secretary of the Interior refusing to issue a patent for more than twenty acres was right. As the single transferee of the rights of an association placer location before discovery, which thereafter made one discovery of borate mineral the appellant is entitled to a patent to only twenty acres surrounding the discovery

Section 2331 of the Revised Statutes, 30 U. S. C. 35, provides that no placer "location shall include more than twenty acres for each individual claimant * * *." Section 2330 of the Revised Statutes, 30 U. S. C. 36, provides that "two or more persons, or associations of persons, having contiguous claims of any size * * * may make joint entry thereof; but no location of a placer-claim * * * shall exceed one hundred and sixty acres for any one person or association of persons, * * *."

These two sections have been held to mean this:

> The unit of an individual placer mining claim is 20 acres. Section 2331, R. S. * * * But an association of persons may make a location of a tract which shall embrace as many individual claims of 20 acres each as there are individuals in the association, not to exceed eight locators making a location aggregating 160 acres. Section 2330, R. S. * * *. *Hall* v. *M'Kinnon,* 193 Fed. 572, 574.

By the provisions of Section 2320 of the Revised Statutes (30 U. S. C. 23) "no location of a mining claim shall be made until the discovery of the vein

or lode within the limits of the claim located." Section 2320 applies to lode claims. But by Section 2329 of the Revised Statutes (30 U. S. C. 35) placer claims "shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims."

Thus discovery is essential to placer as well as lode claims. *Cole* v. *Ralph,* 252 U. S. 286, 295. "In practice discovery usually precedes location, and the statute treats it as the initial act. But in the absence of an intervening right it is no objection that the usual and statutory order is reversed. *In such a case the location becomes effective from the date of discovery.*" [Italics supplied.[1]] *Cole* v. *Ralph*, 252 U. S. 286, 296. Put another way, "discovery may follow after location and *give validity to the claim as of the time of discovery,* provided no rights of third parties have intervened." *Union Oil Co.* v. *Smith,* 249 U. S. 337, 347. Before discovery, an explorer is treated as a licensee or tenant at will. He "may hold the place in which he may be working *against all others having no better right,* and while he remains in possession, diligently working towards discovery, is entitled—at least for a reasonable time—to be protected against forcible, fraudulent, and clandestine intrusions upon his possession." But "it is clear

[1] Unless otherwise stated, all italicization of quotations is supplied.

that *in order to create valid rights or initiate a title as against the United States* a discovery of mineral is essential." *Union Oil Co.* v. *Smith,* 249 U. S. 337, 346, 347. In the process of acquiring title from the United States, discovery is the "primary, the initial fact." *Mining Co.* v. *Tunnel Co.,* 196 U. S. 337, 345.

In the light of these statutes and the construction thus given them, what are the rights of the single prediscovery transferee of an association placer who thereafter makes one discovery? Do the statutes mean that he is to be treated as any other individual applicant for a patent and the grant of a patent limited to 20 acres? Or do the statutes place him in the same position as his transferors in that upon making one discovery, he may receive a patent to the extent of their prediscovery location which may include but not exceed as much as 160 acres?

Three considered decisions of the Secretary of the Interior have answered these questions by holding that such single transferee may receive a patent for only the 20 acres upon which the discovery has been made. One is the decision in this case. (R. pp. 14–31.) The other two are *H. H. Yard et al.,* 38 L. D. 59, 68, decided in 1909, and *Bakersfield Fuel and Oil Co.,* 39 L. D. 460, decided in 1911. There are no decisions of the Secretary to the contrary.

The reasoning of the three decisions is substantially this: The question does not involve the pre-

discovery possessory rights of the association locators as against parties other than the United States. It involves the right of the individual transferee of the association locators as against the United States with regard to obtaining title. Prior to discovery, an explorer has no rights against the United States, he holds his possession by sufferance and not by right. Discovery is the essential basis for the initiation of title to mineral lands. The extent of the rights created by discovery must then be judged as of that time. If at the time of discovery, the location is held by a single individual or corporation, then a patent may be issued for no more than 20 acres pursuant to Section 2331, Revised Statutes, 30 U. S. C. 35. If on the other hand it is then held by an association of eight persons, a patent may issue for 160 acres pursuant to Section 2330, Revised Statutes, 30 U. S. C. 36. So far as any rights against the United States are concerned, the prediscovery transfer of the rights of the eight associates conveys nothing, even if as against others the transferee may thus acquire some possessory rights. If such transferee proceeds to make a discovery he may receive a patent for only 20 acres. As against the United States he is no different than any other individual locator who has perfected his location by discovery. Neither of them acquires any rights against the United States until discovery. To hold otherwise would permit a single claimant to secure indirectly more land than the statute permits and would in effect violate the re-

quirement that more than 20 acres may be allowed only to associates.

In deciding this question of law against the appellant the Department followed the administrative rulings and construction of the mining statutes adopted in the *Yard* and *Bakersfield* cases. In doing so, it was not merely adopting what we submit to be the sound reasoning of those decisions and following its own previous rulings. It was also obeying the unequivocal implied mandate of Congress.

The *Yard* case was decided July 3, 1909. The *Bakersfield* case was decided January 19, 1911. The mineral involved in the *Yard* case was gold, that in the *Bakersfield* case oil. On February 1, 1911, 12 days after the *Bakersfield* decision, H. R. 32344 was introduced in Congress and became the act of March 2, 1911 (36 Stat. 1015, 30 U. S. C. 103). The statute is as follows:

> An Act To protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment

> thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: *Provided, however,* That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry.

This statute modified the rule of the *Yard* and *Bakersfield* decisions to a significantly limited extent: (a) It only concerns lands containing petroleum, mineral oil, or gas; this despite the fact that the rule announced in the *Yard-Bakersfield* cases applied to all placer mineral locations and the *Yard* decision involved gold. (b) Even as to petroleum, oil and gas, the statute applies only to "lands located or claimed" prior to March 2, 1911. The statute failed to change the *Yard-Bakersfield* ruling with regard to all other minerals and as to petroleum, gas and oil where the lands were located or claimed after March 2, 1911. To the extent that Congress thus failed to change the *Yard-Bakersfield* rulings it clearly impliedly approved them. The mineral involved in this case is neither petroleum, oil or gas but borate and as to it the ruling has thus been approved.

While Congress is assumed to legislate with knowledge of previous administrative rulings on the subject matter involved, *National Lead Co.* v. *United States,* 252 U. S. 140, 147, in the case of this statute legislative history reveals an actual knowledge of the *Yard* and *Bakersfield* cases. It demonstrates what is plainly implied on the face of the statute, namely, that it was intended to grant relief to a limited class of placer applicants for special reasons and that Congress impliedly approved the rule as otherwise applied.

The reports of the House and Senate Committees on Public Lands are substantially similar. Senate Report No. 1179, House Report No. 2075, 61st Congress, 3d Session. They are both printed in full as appendices to this brief. (*Infra,* pp. 39, 49.)

The following is from the Senate report:

> Since 1897 public lands containing oil, asphaltum, etc., have been subject to location and entry under the placer mining laws. Under that law one person may locate 20 acres or eight persons acting together may locate 160 acres and treat it as one claim.
>
> In the development of oil in California it has been the almost universal practice for the eight locators to form a corporation and convey their claim to it. This avoided any complication in title that might result from the death of either of the joint owners and also made it more convenient to invite in other capital to help with the sinking of the first wells. This practice was not objected

to by the department, and many patents were issued to the grantees of the locators.

But about two years ago the department had occasion to examine the law very critically in a case where one H. H. Yard had with seven associates located a very large amount of land alleged to contain gold but covered with good timber. The seven associates conveyed their interests to Yard before actual discovery of gold on each claim, and the department held that such conveyance carried no title to the land, because a "mining claim" was not a real claim and a tangible thing capable of conveyance till actual discovery of the mineral.

This new interpretation of the law found numerous oil companies with claims on which they had expended large sums of money in drilling for oil—sometimes from $20,000 to $50,000—but where they had taken conveyance from the locators before actual discovery or the completion of the first well. This bill aims to relieve these companies by allowing them to take title the same as if the conveyance had been made after discovery.

The bill is strongly favored by the department as an act of simple justice to thousands of people who have invested in the stock of these companies, and a less number who have invested heavily in these hazardous enterprises. In recently deciding adversely the application for patent of the Bakersfield Fuel & Oil Co., the department said if their "interpretation of the law works disadvantageously or inequitably, relief should be

secured through Congress," and in view of the situation existing the department has already called the attention of Congress to the facts, and recommended remedial legislation in favor of those bona-fide locators who have diligently prosecuted their work to fruition.

The views of the department with reference to this subject will be found in the subjoined correspondence, more particularly in the letter to the Committee on Public Lands of the Senate.

The letter of the Secretary of the Interior to the committee to which reference is made is then set forth. In part it states:

Because of the conditions peculiar to oil and gas deposits, which commonly lie at great depths in the earth and can be developed only by extended effort and at a high cost, it appears that individuals, in associations of two and upward, have in the past in great numbers of cases initiated placers upon such lands by taking such steps in that behalf as they were able, but minus the all-important elements of discovery and, whenever unable to proceed further for lack of means, they have transferred either to an individual, or to an association of, perhaps, fewer persons, or to a corporation by whom the discovery and development have been accomplished. This procedure appears to have been the result of what was reasonably considered to be competent legal advice, but the department's interpretation of the min-

> ing law, and which it is constrained to regard as sound, is that an individual transferee, or a corporation as an entity in legal contemplation, may perfect by discovery a placer of no greater area than either could originally locate, namely, 20 acres.
>
> It is my conviction that for the relief of those cases a remedial measure is both needed and deserved, but I think it may well be confined to existing cases. I therefore recommend that the bill be amended by striking out the words "or hereafter" as they appear in line 6 on page 1.

The last sentence refers to a predecessor bill. (Senate Committee Report, *supra,* p. 2, Appendix hereof.) Congress adopted the suggestion of the Secretary of the Interior and deliberately chose to grant relief in cases involving "lands *heretofore* located or claimed under the mining laws of the United States containing *petroleum, mineral oil, or gas.*"

With full knowledge of the departmental ruling Congress modified it only in part. To the extent that it was not modified, Congress must be deemed to have approved the ruling. The failure of Congress to amend a statute after administrative rulings have construed or applied it constitutes approval of the rulings.

> *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345;
> *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492, 493;

Corning Glass Works v. *Robertson,* 65 F. (2d) 476, 62 App. D. C. 130, cert. denied 290 U. S. 645;

First Nat'l Bank of Greeley v. *United States,* 86 F. (2d) 938, 939;

Missouri v. *Ross,* 299 U. S. 72, 75.

Where, as here, Congress has modified the administrative ruling in part only, the conclusion is doubly compelling that it has approved the unmodified portion. This case is governed by so much of the ruling as was not modified. The decision of the Secretary followed the mandate of Congress and was for that reason, if for no other, plainly right.

Moreover, because of that mandate, the cases cited by the appellant and claimed to support its contention that the decision of the Department was wrong are immaterial and cannot affect the disposition of this case. These authorities are not in point for other reasons as well.

2. Acquisition of title to public lands under the mining statutes of the United States involves questions of Federal law as to which the decisions of State courts are not of binding authority

Among the cases cited by appellant are decisions of State courts, notably *Miller* v. *Chrisman,* 140 Cal. 440, and *Merced Oil Co.* v. *Patterson,* 153 Cal. 624, 162 Cal. 358. These cases involved the respective *possessory* rights of the parties involved, that is, which had the better right to possession. They did not of course adjudicate the rights of any of

the parties as against the United States and did not pass on the question whether and to what extent a patent should issue conveying the title of the United States under its mining statutes. These cases are not binding on the Department for while concededly the State courts may adjudicate the possessory rights of conflicting locators of mining claims, their judgments do not and cannot adjudge the rights of the successful litigant to a patent. "The land department must, under the law, be the judge as to when, under what circumstances, and how the government shall part with its title." Lindley on Mines, 3d Ed., p. 1870; *Clipper Mining & Land Co.* v. *Eli Mining & Land Co.,* 194 U. S. 220; *Perego* v. *Dodge,* 163 U. S. 160; *United States, George B. Conway, Intervener* v. *Grosso,* 53 I. D. 115, 121.

That the California cases cannot help appellant is made plain by assuming a hypothetical set of facts. Let us assume that the appellant in this case had been the successful plaintiff in an action finally determined in the highest court of California, that it had recovered a judgment awarding it possession of the full 80 acres for which it now seeks a patent against some defendant similarly claiming possession thereof, and that in its decision the court had expressly decided that the prediscovery transfer by associate placer claimants gave appellant a better right to possession of the full 80 acres than the defendant. Under the authorities cited it is clear that such a judgment would not prevent the Department from refusing to issue a

patent for more than 20 acres. If the argument of the appellant were correct the obviously specious conclusion would follow that decisions in cases in which the appellant was not a party would be binding on the Department while those in which it was not would not be binding.

There is another reason why these State court decisions are not controlling whether considered as ordinary precedents or as having become a "rule of property". (Appellant's Brief pp. 26–30.) The decision of the question of law whether the single prediscovery transferee of association placer claimants may upon discovery receive a patent for more than 20 acres involves the construction of mining statutes of the United States—Sections 2320, 2329, 2330 and 2331 of the Revised Statutes. It follows that decisions of State courts on the question are in no sense controlling and until the United States Supreme Court has passed thereon, it cannot be said that the statutes in this respect have an established meaning or that there is a "rule of property" on the subject.

> *Calhoun Gold Mining Co.* v. *Ajax Gold Mining Co.,* 182 U. S. 499, 504, 505; 27 Colo. 1; 59 Pac. 607;
>
> *Weiss* v. *Wiener,* 279 U. S. 333, 337;
>
> *Knight* v. *Carter Oil Co.,* 23 F. (2d) 481, 483, 484;
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> *Jefferson* v. *Gypsy Oil Co.,* 27 F. (2d) 304, 306;
>
> *United States* v. *Haddock,* 21 F. (2d) 165.

The relevant portions of the opinions of the Supreme Court of Colorado and the United States Supreme Court in the *Calhoun* case are particularly illuminating, involving as the case did a mining law problem.

> The construction of an act of congress cannot be said to be authoritatively settled until passed upon by the highest court authorized so to do. This is the supreme court of the United States. It has never decided the question regarding cross veins as presented in the case at bar. * * * For these reasons we conclude that, although this court has passed upon the identical question regarding cross veins now involved, it is not precluded from again considering it, under the doctrine of stare decisis, or that the law as announced by this court in previous cases has become a settled rule of property in this state; and if, upon a reconsideration of such questions, we conclude that our previous decisions thereon were wrong, we should not wait for a superior tribunal to so declare. Supreme Court of Colorado, 27 Colo. 1, 11, 12.

The court proceeded to decide that its previous decisions were wrong and overruled them. In affirming the judgment of that court, the Supreme Court of the United States said:

> Prior to the decision by the Supreme Court of Colorado in the case at bar that court had decided that the junior location was "entitled to all of the ore found on his

vein within the side lines of the senior location, except at the space of intersection of the two veins." * * * In *Coffee* v. *Emigh,* (1890) 15 Col. 184, it was held that the rule laid down in the foregoing cases had become established law. The claims of the plaintiff in error were located after the decisions, and it is contended that the rule laid down by them became a rule of property in the State, and it is earnestly urged that to reverse the rule now would take from plaintiff in error that which it "had reason to believe was a vested right in the Victor Consolidated vein."

There are serious objections to accepting that consequence as determinative of our judgment. We might by doing so confirm titles in Colorado but we might disturb them elsewhere. The statute construed is a Federal one, being a law not only for Colorado but for all of the mining States, and, therefore, a rule for all, not a rule for one, must be declared. Besides what consideration should have been given to prior cases, the Supreme Court of the State was better able to judge than we are. It may be that the repose of titles in the State was best effected by the reversal of the prior cases. *At any rate, a Federal statute has more than a local application, and until construed by this court cannot be said to have an established meaning.* 182 U. S. 499, 504, 505.

In support of its argument that the decisions of the California courts establish "rules of property with respect to the public domain" the appellant

cites three cases. *Farrell* v. *Lockhart,* 210 U. S. 142; *Francis* v. *Francis,* 203 U. S. 233; *Nadal* v. *May,* 233 U. S. 447. (Appellant's Brief pp. 27–30.) In *Nadal* v. *May* one of the decisions which the court decided had become a rule of property was that of the United States Supreme Court itself. 233 U. S. 454. In the other two cases the court decided to follow State court precedents involving in one case the construction of an Indian treaty and in the other a problem in mining law.

These cases are not inconsistent with the rule that the construction of an act of Congress cannot be said to be authoritatively settled until passed upon by the United States Supreme Court. In those two cases the State decisions were not controlling until the Supreme Court decided to follow them. The reasons assigned by the Supreme Court in deciding upon the construction of a Federal statute are not important on this point; among them may be the one that State decisions have repeatedly passed on the question and that these should not lightly be disturbed. See *Knight* v. *Carter Oil Co.,* 23 F. (2d) 481, 483, 484. What is important is that only when the Supreme Court has passed on the question is there an authoritative decision. For that reason the Department need not follow State court decisions on questions which involve the construction of mining statutes of the United States but are bound to follow decisions of the United States Supreme Court in such cases.

3. The *Chrisman* v. *Miller* case in the United States Supreme Court did not decide the question here involved. The decision of the Secretary of the Interior is consistent therewith

The Secretary in this case held that the appellant "cannot avail itself of one discovery of mineral after the transfer of the claim to it *as a basis for patent* for more than twenty acres upon which the discovery was made." (R. p. 27.) The appellant argues that the decision of the United States Supreme Court in *Chrisman* v. *Miller,* 197 U. S. 313, is precedent for its position that it should receive a patent for 80 acres and that the Department erred in limiting the grant to 20 acres.

Miller and the Home Oil Company, his lessee, brought an action in the Supreme Court of California to quiet a possessory title. The original defendants were A. Y. Chrisman *et al.* One Fewel intervened as an additional defendant. The Supreme Court of California affirmed a decree for the plaintiff. 140 Cal. 440. The original defendants appealed to the United States Supreme Court; the intervenor Fewel did not. The United States Supreme Court affirmed the judgment of the Supreme Court of California. *Chrisman* v. *Miller,* 197 U. S. 313.

The significant facts in the case were these:

June 14, 1895—Barieau and seven associates attempted to make a mineral location upon the quarter section involved.

December 24, 1896—Whatever interest these eight persons thus acquired was conveyed to Miller.

December 31, 1896—Miller abandoned and relinquished all the rights he had acquired. Thereafter and on the same day Miller and seven others made a location of the tract.

January 1, 1897—Defendants Chrisman made their location.

July 31, 1897—Miller's associates conveyed all their right, title and interest to Miller.

September 17, 1897—Miller executed a lease which was transferred to plaintiff Home Oil Company.

October 1897—Home Oil Company made a discovery of oil.

October 1898 [2]—This action against Defendant Chrisman to quiet a possessory title was commenced.

December 22, 1898—Fewel made his location.

The opinion of the Supreme Court of the United States states the rule that it accepts findings of fact of State courts as final and that by "the findings of the trial court the Chrismans, plaintiffs in error, never made any discovery of petroleum or other mineral oil, did not make the attempted location in good faith, and never did any work on the tract. * * * It would seem from these facts that they

[2] The date is approximate. The opinion of the California Supreme Court states in effect that the action was commenced more than two months before Fewel made his location. 140 Cal. 144.

had no pretense of right to the premises." 197 U. S. 319.

The rest of the opinion consists of a discussion of two contentions of the plaintiffs in error. One is that the Supreme Court of California had set aside the finding of the trial court with respect to discovery. And the court overrules that argument. The second point discussed is this: "the location made by Barieau and his associates, and conveyed by them to Miller, did not lapse until midnight of December 31, 1896; that then it lapsed by reason of the failure to do the annual work required by statute; that Miller could not prior thereto abandon and relinquish that location, and at the same time make a new one, as he attempted to do on the afternoon of December 31, because the effect of such action would be to continue a possessory right to the tracts without compliance with the statutory requirement of work. Hence, as contended, the only valid location was that made on January 1, 1897, by the defendants." 197 U. S. 320. On this point, it was held:

> It may be doubted whether, in view of their want of good faith, the defendants can avail themselves of this contention, and, indeed, also doubted whether they could uphold their location by proof of a discovery by some other party. But it has no foundation in fact. * * * the attempted location by Barieau and his associates in June, 1895, was a failure by reason of lack of discovery. 197 U. S. 320.

In the Supreme Court of California the intervenor Fewel had raised the point that "the effect of the conveyance of his co-locators to Miller before discovery operated as an abandonment by them of their location, and destroyed the validity of the whole location; that the validity of the location thus having been destroyed, the subsequent discovery of oil did not, and could not, serve to validate it, and at the most could have given Miller, as the sole remaining member of the association, the right to relocate twenty acres about his discovery." 140 Cal. 450. The Supreme Court of California expressly overruled that contention, the Chief Justice dissenting. 140 Cal. 450–452. The following is from the dissenting opinion of the Chief Justice:

> I dissent from the order denying a rehearing of this cause. There can be no location of a mining claim before discovery, and there can be no transfer or assignment of a location before the location is complete. There can, in other words, be no assignment of the right to locate. If, in the expectation of discovery, an association of persons marks the boundary of a placer claim containing twenty acres for each associate, I have no doubt that they will be protected in their possession while they proceed with reasonable diligence to prospect the claim, and that by a discovery they will perfect it; but if some of the associates withdraw before discovery or attempt to assign their claims to those who continue the work of development, those who remain will have no right

> to a claim greater in the aggregate than they could have taken by an original location. 140 Cal. 452.

The opinion of the Supreme Court of the United States is completely silent on the point raised by Fewel. So are the preceding headnotes and the summary of the arguments of each side.

Fewel who had raised the point in the Supreme Court of California did not appeal to the Supreme Court of the United States. The Chrismans did press the point in that court but they were in no position to do so. It was only material as between Fewel and Miller. His alleged location was made after the conveyance to Miller by his seven associates. The validity of his location and the extent thereof, if any, would therefore depend on the extent and validity of Miller's location *at that time.* To the extent that Miller's rights had been reduced by the conveyance to him, Fewel might gain. This was not true of the claimed possessory rights of the Chrismans because they were based upon an alleged location made before the conveyance to Miller. The point was not material to the respective possessory rights of Miller and the Chrismans. Even if the court had expressly passed on the question, its conclusion thereon would have been dictum. Consequently it cannot with reason be argued that though the opinion of the court is completely silent on the subject, the court of necessity impliedly decided the question in favor of Miller. Nor can it justifiably be said that because

the point was argued in the briefs, was raised by the specifications of error and pressed upon the court as basis for rehearing, the point "was recognized by the court as being in the case." (Appellant's Brief p. 13.) All that we can logically conclude from these facts is that the question was presented to the court for its consideration.

If these facts are coupled with the further ones that the opinion of the court and the preceding headnotes and summary of the arguments of each side is completely silent on the subject, the fair inference is that the court decided that the point was immaterial and not necessary to its decision. This conclusion is supported by the formal denial of the petition for rehearing in the face of the plea of the unsuccessful appellant that the court had failed to pass on the question. See Appellant's Petition for Rehearing and Journal of U. S. Supreme Court, May 1, 1905.

The appellant takes comfort in the statement of the California Supreme Court in *Merced Oil Co. v. Patterson,* 162 Cal. 358, 362, that "in affirming the judgment of this court in *Miller v. Chrisman,* 140 Cal. 440, the Supreme Court of the United States said nothing inconsistent with what had been said by this court on this question." (Appellant's Brief p. 23.) This characterization if anything helps the appellee. The California court did not suggest that the United States Supreme Court had *approved* its ruling in the *Miller* case, as the appellant contends. Its negative characterization

is in fact quite consistent with appellee's contention that the United States Supreme Court did not decide the question.

Even if for the sake of argument we assume that which we deny, that is, that the Supreme Court of the United States necessarily passed on the question and impliedly held that Miller was rightfully "in possession of the 160 acre tract as the pre-discovery grantee of his seven co-locators" (Appellant's Brief p. 13), there still would be no inconsistency between the decision of that court and the decision of the Secretary denying the appellant a patent for more than 20 acres about a single discovery. The Secretary's decision did not at all involve the appellant's right to possession. It involved only the grant of a patent to the fee. Nothing decided by the Secretary impairs whatever right the appellant may have to the possession of the 60 acres for which a patent was denied. The decision in effect held that before a patent may be issued for the 60 acres the appellant is required to show a discovery for each 20 acres. There is concededly no limitation on the number of 20-acre tracts a claimant may locate or the number of 20-acre patents which may be issued to him. (See Appellant's Brief p. 8.) Such a right of possession to the 60 acres as the appellant had before the Secretary's decision is unaffected thereby. If the appellant still has possession and otherwise complies with the law it may yet obtain a patent for them, provided that it makes at least one discovery

for each 20 acres. Cf. *Clipper Mining Co.* v. *Eli Mining & Land Co.*, 194 U. S. 220, 33 L. D. 660, 665 *et seq.*

Moreover, there is a patent fallacy in the reasoning of the Supreme Court of California on the basis of which it decided against Fewel. Among other things, the court said:

> * * * If, instead of conveying, the seven associates had stood idle and refused to contribute their share to the necessary work of developing, and Miller under these circumstances had alone prosecuted the work to a successful discovery, no one could contend in the face of section 2324 of the Revised Statutes of the United States, but that Miller would have acquired the rights of all, and would have had a perfected location covering the whole one hundred and sixty acres. If, then, by their abandonment, without a conveyance, Miller would have acquired the right to prosecute the work and perfect the whole location for himself individually, it is impossible to see why a conveyance to him of their right, instead of an abandonment of it by a refusal to join in the work, should effectuate any different result. 140 Cal. 451.

The work of development required by Section 2324 (30 U. S. C. 28) was assumed by the court to be required *before* discovery. The assumption was erroneous. The work referred to is required to be performed *after* discovery, not before. The Supreme Court of the United States has expressly so

held. *Union Oil Co.* v. *Smith,* 249 U. S. 334, 350. It follows that so much of the decision of the California Supreme Court as passed on Fewel's point cannot carry much, if any, weight as an authority.

The entire *Bakersfield* decision is appended to the Senate Committee report on H. R. 32344 which became the act of March 2, 1911, *supra,* and both Senate and House Committee reports refer to the decision. (See both reports, Appendix hereof.) In the *Bakersfield* case the Secretary expressly declared that the Department did not feel itself bound by *Miller* v. *Chrisman* in the Supreme Court of California and that it was convinced the Supreme Court of the United States had not adopted the doctrine of the California decision. 39 L. D. 460, 462. Congress was quite aware of the *Miller* decisions and the views of the Department thereon. Nevertheless Congress chose to modify the departmental ruling in part only and impliedly otherwise approved it.

4. The other cases cited by appellant are plainly distinguishable

Union Oil Co. v. *Smith,* 249 U. S. 337 (Appellant's Brief pp. 14–17), concerned the possessory rights of two locators, neither of whom had made discovery. In this case we are dealing with the effect of a discovery under certain circumstances on the rights of the discoverer to a patent. There is nothing in the opinion even remotely relevant to the issue herein.

In *United States* v. *Stockton Midway Oil Co.*, 240 Fed. 1006, and *United States* v. *North American Oil Co.*, 242 Fed. 723, Appellant's Brief pp. 23, 24, the transfers of the unperfected locations before discovery were within the terms of the Act of March 2, 1911, 36 Stat. 1015, because they antedated the statute and covered oil lands. And so the question of the extent of the area for which a patent might be issued was not in the cases.

The appellant cites these and other cases (Brief pp. 4–7) as support for the argument that before discovery a locator has rights which are transferable. True, association locators in actual possession diligently searching for minerals have a superior possessory right as against intruders, "all persons save the government", *United States* v. *Stockton Midway Oil Co.*, 240 Fed. 1006, 1008, 1009, and this right is transferable. Such right of possession however has no relationship to the right of the discoverer to a patent from the United States. (See Secretary's Decision, R. pp. 24, 25.)

Regardless of the relevancy or scope of any of the cases appellant cites in alleged support of its position that the decision of the Secretary was wrong, they cannot affect the disposition of this case. In the Act of March 2, 1911, 36 Stat. 1015, Congress expressed its unequivocal implied approval of the *Yard-Bakersfield* ruling in so far as it applies to minerals other than petroleum, oil and gas. As a result, any conceivable relevancy of appellant's cases has been nullified.

5. The writ of mandamus will not issue even if it be assumed for the sake of argument that the decision of the Secretary was not correct

Even if it be assumed that the decision of the Secretary herein was not correct, the court will not issue its writ of mandamus to compel the Secretary to do that which he has decided he should not do. The question of law decided by him involved the construction of statutes not free from doubt. Ever since 1909, the Department has consistently followed the construction and ruling adopted. That ruling and construction are not clearly inconsistent with the statutes. On the contrary Congress impliedly approved them except as to petroleum, gas and oil, and the duty of the Secretary was thus clear to follow that ruling and construction as to all other minerals. The extraordinary writ of mandamus will not issue to compel him to adopt a different construction than the one which in the exercise of his discretion he decided was right.

> *Wilbur* v. *United States ex rel. Kadrie et al.,* 281 U. S. 206;
>
> *United States ex rel. McLennan* v. *Wilbur,* 283 U. S. 414;
>
> *United States ex rel. Ness.* v. *Fisher,* 223 U. S. 683;
>
> *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316.

In *Wilbur* v. *United States ex rel. Kadrie,* 281 U. S. 206, mandamus to compel the Secretary of the Interior to restore the relators' names to the

rolls of the Chippewa Indians was denied. The court refused to disturb the Secretary's decision of a question of law involving the interpretation of statutes which did not clearly require an opposite conclusion. The general rule announced, 281 U. S. 218, 219, was this:

> Mandamus is employed to compel the performance when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.
>
> The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded

> as involving the character of judgment or discretion which cannot be controlled by mandamus.

Mandamus against the Secretary of the Interior was again refused in *United States ex rel. McLennan* v. *Wilbur,* 283 U. S. 414, because his decision depended on the interpretation of a statute and it was susceptible of the construction he adopted. The court said, 283 U. S. 419, 420:

> It is unnecessary now to declare the precise meaning of the relevant provisions of the Act. * * * Looking only at its words one may interpret Sec. 13 as the Secretary says he did. And this conclusion is aided by consideration of his general powers over the the public lands as guardian of the people. * * *
>
> Under the established rule the writ of mandamus cannot be made to serve the purpose of an ordinary suit. It will issue only where the duty to be performed is ministerial and the obligation to act peremptory, and plainly defined. The law must not only authorize the demanded action, but require it; the duty must be clear and indisputable. * * *

Riverside Oil Co. v. *Hitchcock,* 190 U. S. 316, was a case in which mandamus was sought to compel the Secretary of the Interior to approve certain land selections and cause a patent to be issued. The answer of the Secretary was that pursuant to the duty imposed upon him he was required to construe the particular statute on which his de-

cision turned and that in the exercise of his judgment and discretion he had construed it so as to require him to reject the relator's application and refuse a patent. 190 U. S. 322, 323. In affirming a judgment denying a petition for a writ of mandamus, the court said, 190 U. S. 324, 325:

> Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling and care and disposition of the public lands.
>
> * * * * *
>
> That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdiction to decide at all, he had necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a

> decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

Similarly in this case it may be said that "the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument" by a reading of his decision and of the briefs herein.

In *Ness* v. *Fisher,* 223 U. S. 683, the Secretary of the Interior had rejected an application to purchase public land on the ground that the relevant statute required the applicant's statement with respect to the character and condition of the land to be made upon personal knowledge and the applicant made

such statement upon information and belief. The Supreme Court held that it would not review the correctness of that decision and held that mandamus would not lie. The court said, 223 U. S. 691, 692:

> The Secretary's decision, rejecting the relator's application, was not arbitrary or capricious, but was based upon a construction of Sec. 2 which was at least a possible one, had long prevailed in the Land Department, had been approved in *United States* v. *Wood,* 70 Fed. Rep. 485, and *Hoover* v. *Salling,* 102 Fed. Rep. 716, and has since been sustained by the Court of Appeals in the present case. True, a different construction had been adopted in *Hoover* v. *Salling,* 110 Fed. Rep. 43, and has since been followed in *Robnett* v. *United States,* 169 Fed. Rep. 778, but this, instead of indicating that the Secretary's decision was arbitrary or capricious, illustrates that there was room for difference of opinion as to the true construction of the section, and that to determine whether the relator's application conformed thereto necessarily involved the exercise of judgment and discretion.
>
> So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The

> question is not new, but has been often considered by this court and uniformly answered in the negative. * * *

In the case now before the court the Secretary's decision limiting the area of the land to be patented to 20 acres was surely neither arbitrary nor capricious. That it was not arbitrary or capricious is amply demonstrated by the long reasoned decision itself, carefully and at great length reviewing all the complicated considerations and arguments and a great number of cases, by the fact that he followed departmental rulings consistently adhered to since 1909 and by the further fact that in following those rulings and deciding to grant appellant's application for a patent to the extent of 20 acres only, he obeyed the clear mandate of Congress.

The cases cited by appellant are not inconsistent with and recognize the rule of the foregoing cases. (Appellant's Brief pp. 33–40.) In *Wilbur* v. *United States ex rel. Krushnic,* the court held that mandamus would lie because "the Secretary interpreted and applied a statute contrary to its *explicit* terms, and in so doing, departed from a *plain* official duty." 280 U. S. 306, 319. The case cited by appellant as *United States* v. *West,* 30 F. (2d) 742, is the one which in the Supreme Court became the aforesaid *Wilbur* v. *United States ex. rel. Krushnic* case. In *Ickes* v. *Virginia-Colorado Development Corp.,* the mandatory injunction against the Secretary was sustained on the ground that the statute was clear and explicit. 295 U. S. 639, 646.

In this case the Secretary has neither interpreted a statute contrary to its clear, explicit terms nor has he departed from any plain duty.

CONCLUSION

For all these reasons, the decree of the District Court should be affirmed.

Respectfully submitted.

NATHAN R. MARGOLD,
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DECEMBER 21, 1937.

APPENDIX

CALENDAR NO. 1105

61st Congress, 3d Session. Senate. Report No. 1179

Locators of Oil and Gas Lands

February 16, 1911.—Ordered to be printed. Mr. Flint, from the Committee on Public Lands, submitted the following

REPORT

[To accompany H. R. 32344.]

The Committee on Public Lands, to whom was referred the bill (H. R. 32344) to protect locators in good faith of oil and gas lands, have had the same under consideration, and with certain amendments recommend that the bill do pass.

Amend in line 8, page 1, by striking out the words "to a" at the end of said line.

Amend in lines 5 and 6, page 2, by striking out all in said lines after the word "of," in line 5, and inserting in lieu thereof the words "inception of development on or under such claim withdrawn from mineral entry."

Since 1897 public lands containing oil, asphaltum, etc., have been subject to location and entry under the placer mining laws. Under that law one person may locate 20 acres or eight persons acting

together may locate 160 acres and treat it as one claim.

In the development of oil in California it has been the almost universal practice for the eight locators to form a corporation and convey their claim to it. This avoided any complication in title that might result from the death of either of the joint owners and also made it more convenient to invite in other capital to help with the sinking of the first wells. This practice was not objected to by the department, and many patents were issued to the grantees of the locators.

But about two years ago the department had occasion to examine the law very critically in a case where one H. H. Yard had with seven associates located a very large amount of land alleged to contain gold but covered with good timber. The seven associates conveyed their interests to Yard before actual discovery of gold on each claim, and the department held that such conveyance carried no title to the land, because a "mining claim" was not a real claim and a tangible thing capable of conveyance till actual discovery of the mineral.

This new interpretation of the law found numerous oil companies with claims on which they had expended large sums of money in drilling for oil—sometimes from $20,000 to $50,000—but where they had taken conveyance from the locators before actual discovery or the completion of the first well. This bill aims to relieve these companies by allowing them to take title the same as if the conveyance had been made after discovery.

The bill is strongly favored by the department as an act of simple justice to thousands of people who have invested in the stock of these companies,

and a less number who have invested heavily in these hazardous enterprises. In recently deciding adversely the application for patent of the Bakersfield Fuel & Oil Co., the department said if their "interpretation of the law works disadvantageously or inequitably, relief should be secured through Congress," and in view of the situation existing the department has already called the attention of Congress to the facts, and recommended remedial legislation in favor of those bonafide locators who have diligently prosecuted their work to fruition.

The views of the department with reference to this subject will be found in the subjoined correspondence, more particularly in the letter to the Committee on Public Lands of the Senate.

DEPARTMENT OF THE INTERIOR,
January 16, 1911.

SIRS: I am in receipt, by your recent reference, of the bill (S. 9818) to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the pubic lands of United States, or their successors in interest, for information as to the law and the facts in relation thereto and for such suggestions as this department may see fit to offer.

Because of the conditions peculiar to oil and gas deposits, which commonly lie at great depths in the earth and can be developed only by extended effort and at a high cost, it appears that individuals, in associations of two and upward, have in the past in great numbers of cases initiated placers upon such lands by taking such steps in that behalf as

they were able, but minus the all-important elements of discovery and, whenever unable to proceed further for lack of means, they have transferred either to an individual, or to an association of, perhaps, fewer persons, or to a corporation by whom the discovery and development have been accomplished. This procedure appears to have been the result of what was reasonably considered to be competent legal advice, but the department's interpretation of the mining law, and which it is constrained to regard as sound, is that an individual transferee, or a corporation as an entity in legal contemplation, may perfect by discovery a placer of no greater area than either could originally locate, namely, 20 acres.

It is my conviction that for the relief of those cases a remedial measure is both needed and deserved, but I think it may well be confined to existing cases. I therefore recommend that the bill be amended by striking out the words "or hereafter" as they appear in line 6 on page 1.

It is observed, too, that in its present form the bill is much broader than the withdrawal act of June 25, 1910, which, by the first proviso of the second section, recognizes only such occupancy and diligent exploration as has preceded any order of withdrawal theretofore and thereafter made, while the pending bill would ignore any such withdrawal preceding that act, although ratified and reiterated by the President thereunder. I therefore respectfully recommend that the bill be further amended by striking out all after the word "withdrawal," in line 10, on page 1, to and including the word "authority," in line 2, on page 2.

With these amendments, I respectfully recomment that the bill be enacted into law.

Very respectfully,

R. A. BALLINGER,
Secretary.

The COMMITTEE ON PUBLIC LANDS,
United States Senate.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, February 9, 1911.

SIR: Replying to your communication of this date, I have to state that in the opinion of the department the suggested amendment, as stated theerin, will improve the oil remedial bill, H. R. 32344. The necessity is further suggested of striking out the words, "to a," at the end of line 8, in order to carry the force of the adjective "qualified" over to the word "corporation."

The proviso, "*Provided, however,* That such lands were not at the time of the inception of such claim and of development thereon or thereunder withdrawn from mineral entry," is believed to have all the force intended to be given to the proviso in the bill as passed by the House. The House proviso, however, contains the words "any withdrawal," which might have the effect (which, it is believed, was neither intended nor desired) of including withdrawals of oil lands "from agricultural entry," made in Wyoming lands as early as 1900, and in California in 1907 and 1908. Such withdrawals had as their sole purpose the protection of the oil locator, and manifestly lands so withdrawn should not be excluded in any degree from

the remedial effect of this legislation. The qualification accomplished by the words "withdrawn from mineral entry" thus becomes necessary.

The suggested wording of the proviso also recognizes the inception both of the claim and of the development thereunder as essential elements in the inauguration of an equity by the oil land locator, and, it is believed, fully insures the bona fides of the claimant seeking relief under this legislation.

The bill in this form has the approval of the department, and I repeat my expressions of conviction contained in my letter of January 16, addressed to your committee, that the remedial measure is both needed and deserved, with the recommendation that the bill be enacted into law.

Very respectfully,

R. A. BALLINGER, *Secretary.*

Hon. FRANK P. FLINT,
United States Senate, Washington, D. C.

THE SECRETARY OF THE INTERIOR,
Washington, February 14, 1911.

MY DEAR SENATOR: Replying to your letter of February 14, 1911, submitting a proposed amendment to the proviso to H. R. 32344, as follows:

"*Provided, however,* That such lands were not at the time of the inception of development on or under such claim, withdrawn from mineral entry"—

I have the honor to advise you that in my opinion the proposed amended proviso will effect the same end contemplated by the original proviso, and I have no objection to offer to the suggested change,

which emphasizes the fact that there must have been development initiated upon the claims prior to the withdrawal in order that they shall have the benefit of the provisions of the act.

Very respectfully,

R. A. BALLINGER, *Secretary.*

Hon. FRANK P. FLINT,
United States Senate.

[34 L. D., 222.]

BAKERSFIELD FUEL AND OIL CO.

[Decided Jan. 19, 1911.]

Placer location—Oil lands—Transferee.—A placer location of oil lands for 160 acres, made by eight persons and subsequently transferred to a single individual, invalid because not preceded by discovery, can not be perfected by the transferee upon a subsequent discovery to the full area so located, but only as to 20 acres thereof.

Corporation—Regarded as entity in acquiring public lands.—A corporation in acquiring title under the public land laws must be regarded as an entity, with no greater right than an individual.

Discovery—Prerequisite to initiation of title.—Discovery of mineral is an essential prerequisite to initiation of title under the mining laws.

Discovery subsequent to location—Doctrine of relation.—While discovery of mineral susequent to location of a mining claim is sometimes held by the land department to relate back to the

date of location, where there was no precedent discovery, the doctrine of relation can not be invoked to the disadvantage of intervening adverse claims, nor to permit anyone to secure more land by indirect means than may be done directly.

PIERCE, *First Assistant Secretary:*

The Bakersfield Fuel and Oil Co., a corporation organized and existing under the laws of the State of California, appellant herein, applied for a patent to the Pitney No. 2 oil placer claim, containing 160 acres, situate in the Visalia (Cal.) land district. The Commissioner of the General Land Office held that the company could secure patent to only 20 acres and required it to elect which 20 acres it would take and to cast off the excess of 140 acres, basing his decision on the Yard case (38 L. D., 59). The company has appealed to the department.

On the 22d day of June, 1899, eight persons attempted to locate said 160 acres of land as a single oil placer mining claim. No discovery of oil or other mineral had been made. During the month of August, 1899, and before discovery, all of said eight persons conveyed their so-called claim to the appellant company, which sunk a well on the claim and actually discovered oil in paying and commercial quantities on the 25th day of September, 1900, at a depth of 1,207 feet. No oil or other mineral was discovered in the claim prior thereto.

The case has been exhaustively and ably argued by eminent counsel and carefully prepared briefs have been filed. The law of the case is within narrow limits and was clearly announced in the Yard case, supra, that a placer location of 160 acres, made

by eight persons and subsequently transferred to a single individual before discovery, can not be perfected by the transferee upon a subsequent discovery to over 20 acres. While the Yard case involved placer locations for gold and other precious minerals, it can not be distinguished from the case at bar. The placer law was applied to oil lands by act of Congress on February 11, 1897 (29 Stat. L., 526). The act of May 10, 1872, carried into the Revised Statutes as section 2331, declares that no placer location shall include more than 20 acres for each individual claimant. This is a limitation upon the size of an individual claim. The department has frequently held that a corporation in acquiring public lands is a single entity and has no greater right than an individual. (Igo Bridge Extension Placer, 38 L. D., 281, and other cases.)

Discovery of mineral is the one absolutely necessary prerequisite to the initiation of title to mineral lands on the public domain. Until discovery is made the so-called locators hold their possession by sufferance and not by right; until discovery is made they acquire no interest in the public domain and have nothing to convey. But it is pressed upon our attention that locations are frequently made without discovery of mineral and that upon discovery the claims relate back to date of location. It is true that the department often recognizes the validity of such locations by relation, but the doctrine of relation has never been invoked to the disadvantage of intervening adverse claimants, nor to permit anyone to secure more land in an indirect method than he could directly.

Appellant relies upon the case of *Miller* v. *Chrisman* (140 Cal., 140), in which the supreme court

of California clearly decided adverse to the doctrine of the *Yard* case. While the department has great respect for the decisions of the State courts, it does not feel bound to follow them at all times. The case of *Miller* v. *Chrisman* was carried to the Supreme Court of the United States and there affirmed (197 U. S., 313). A careful and critical examination of the opinion of the Supreme Court of the United States convinces the department that that court did not intend to and did not adopt the doctrine laid down by the supreme court of California. There is no suggestion in the opinion that would warrant any such conclusion. It turned upon another point that the intervener had not made such a discovery as would entitle him to protection. We do not regard it as an authority in the case at bar.

It is pressed upon our attention that the method pursued by the appellant in its attempt to acquire patent to public oil land has been the common method in use in California for many years and that many patents have been issued under similar circumstances. This is the first time the question has been presented to the department for decision. Whenever a new question is presented it must be decided upon the law, and if the interpretation of the law works disadvantageously or inequitably relief should be secured through Congress; and in view of the situation existing the department has already called the attention of Congress to the facts and recommended remedial legislation in favor of those bona fide locators who have diligently prosecuted their work to fruition. The decision is affirmed.

UNION CALENDAR NO. 383

61st Congress, 3d Session. House of Representatives. Report No. 2075

Locators of Oil and Gas Lands

February 4, 1911. Committed to the Committee of the Whole House on the state of the Union and ordered to be printed. Mr. Smith of California, from the Committee on the Public Lands, submitted the following

REPORT

[To accompany H. R. 32344.]

The Committee on the Public Lands, to whom was referred the bill (H. R. 32344) to protect locators in good faith of oil and gas lands, have had the same under consideration, and with certain amendments recommend that the bill do pass.

Amend line 13 by striking out all after "cases."

Amend by adding at the end of line 13 the following:

Provided, however, That such lands were not at the time of entry into possession thereof covered by any withdrawal.

Since 1897, public lands containing oil, asphaltum, etc., have been subject to location and entry under the placer-mining law. Under that law one person may locate 20 acres, or eight persons acting together may locate 160 acres and treat it as one claim.

In the development of oil in California it has been the almost universal practice for the eight locators to form a corporation and convey their claim

to it. This avoided any complications in title that might result from the death of either of the joint owners, and also made it more convenient to invite in other capital to help with the sinking of the first wells. This practice was not objected to by the department and many patents were issued to the grantee of the locators.

But about two years ago the department had occasion to examine the law very critically in a case where one H. H. Yard had with seven associates located a very large amount of land alleged to contain gold, but being covered with good timber. The seven associates conveyed their interests to Yard before actual discovery of gold on each claim, and the department held that such conveyances carried no title to the land, because a "mining claim" was not a real claim and a tangible thing capable of conveyance till actual discovery of the mineral.

This new interpretation of the law found numerous oil companies with claims on which they had expended large sums of money in drilling for oil—sometimes from $20,000 to $50,000—but where they had taken conveyance from the locators before actual discovery or the completion of the first well. This bill aims to relieve these companies by allowing them to take title the same as if the conveyance had been made after discovery. The bill is strongly favored by the department as an act of simple justice to thousands of people who have invested in the stock of these companies and a less number who have invested heavily in these hazardous enterprises. In recently deciding adversely the application for patent of the Bakersfield Fuel & Oil Co., the department said: "If their interpretation of the law works disadvan-

tageously or inequitably, relief should be secured through Congress;" and in view of the situation existing the department has already called the attention of Congress to the facts and recommended remedial legislation in favor of those bona fide locators who have diligently prosecuted their work to fruition.

The views of the department with reference to this subject will be found in the subjoined correspondence, more particularly in the letter to the Committee on Public Lands of the Senate.

SECRETARY OF THE INTERIOR,
Washington, D. C., January 30, 1911.

SIR: Receipt is acknowledge of your communication of January 24, 1911, advising that while it seems to be the judgment of your committee that legislative relief on the so-called Yard decision should be accorded, you believe it exceedingly important that legislation looking to that end should not raise other questions, and accordingly submit tentative draft of the proposed substitute for H. R. 31437, which you believe will accomplish that result, with the informal request for the department's view as to the construction of the language of said tentative draft.

The department has heretofore submitted its views to the Senate Committee on Public Lands with reference to legislation on this subject and adheres to the same, but limiting this communication strictly to the effect of a law in the terms of said tentative draft, I have to state that it would accomplish relief from the Yard decision without

limitation in so far as oil locations hitherto made are concerned.

Very respectfully,

R. A. BALLINGER, *Secretary.*

Hon. F. W. MONDELL,
Chairman, Committee on the Public Lands,
House of Representatives.

DEPARTMENT OF THE INTERIOR,
January 16, 1911.

SIRS: I am in receipt, by your recent reference, of the bill (S. 9818) to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of United States, or their successors in interest, for information as to the law and the facts in relation thereto and for such suggestions as this department may see fit to offer.

Because of the conditions peculiar to oil and gas deposits, which commonly lie at great depths in the earth and can be developed only by extended effort and at a high cost, it appears that individuals, in associations of two and upward, have in the past in great numbers of cases initiated placers upon such lands by taking such steps in that behalf as they were able, but minus the all-important elements of discovery and, whenever unable to proceed further for lack of means, they have transferred either to an individual, or to an association of, perhaps, fewer persons, or to a corporation, by whom the discovery and development have been accomplished. This procedure appears to have been the result of what was reasonably considered to be competent legal advice, but the department's

interpretation of the mining law, and which it is constrained to regard as sound, is that an individual transferee, or a corporation as an entity in legal contemplation, may perfect by discovery a placer of no greater area than either could originally locate, namely, 20 acres.

It is my conviction that for the relief of those cases a remedial measure is both needed and deserved, but I think it may well be confined to existing cases. I therefore recommend that the bill be amended by striking out the words "or hereafter" as they appear in line 6 on page 1.

It is observed, too, that in its present form the bill is much broader than the withdrawal act of June 25, 1910, which, by the first proviso of the second section, recognizes only such occupancy and diligent exploration as has preceded any order of withdrawal theretofore and thereafter made, while the pending bill would ignore any such withdrawal preceding that act, although ratified and reiterated by the President thereunder. I therefore respectfully recommend that the bill be further amended by striking out all after the word "withdrawal," in line 10 on page 1, to and including the word "authority," in line 2 on page 2.

With these amendments, I respectfully recommend that the bill be enacted into law.

Very respectfully,

R. A. BALLINGER, *Secretary.*

The COMMITTEE ON PUBLIC LANDS,
United States Senate.

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UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA
FILED JAN 8 - 1938

IN THE

United States Court of Appeals for the District of Columbia

APRIL TERM, 1937.

No. 7023.

SPECIAL CALENDAR

UNITED STATES, *ex rel.*, UNITED STATES BORAX COMPANY, PETITIONER AND APPELLANT,

vs.

HAROLD L. ICKES, Secretary of the Interior, RESPONDENT AND APPELLEE.

REPLY BRIEF OF APPELLANT.

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Tower Building.

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Yard and Bakersfield decisions of the secretary.

Appellee's brief places its main reliance on the Yard and Bakersfield Fuel Oil decisions of the Secretary of the Interior as interpretive of the statute in question and as establishing the law on the subject. (Brief of Appellee, pp. 7-10.) As was pointed out in appellant's opening brief (pp. 30-33) the fundamental weakness in the reasoning of both of these cases was the erroneous assumption that the locators, prior to discovery, "ac-

quire no interest in the public domain and have nothing to convey." Appellee in his decision as Secretary of the Interior in the instant case expressly admits that this inchoate right "is transferable," thus expressly recognizing the basic error in the reasoning of the Yard and Bakersfield cases.

Act of March 2, 1911 (36 Stat. 1015, 30 U. S. C. 103).

Appellee's brief makes much of this Act, claiming that its failure to mention mineral lands other than "petroleum, mineral oil or gas" must, therefore, by implication be taken as excluding from its operation other minerals and that by its terms it was also confined to claims located prior thereto. (Brief of Appellee, pp. 9-12.) We must bear in mind that, as the committee reports and remarks of members of Congress when it was up for debate show, it was a curative statute pure and simple, intended to cure a great inequity which had arisen by reason of the ruling on this very point in the Yard and Bakersfield cases. Oil lands were then the subject-matter of interest and these various statements made by leading Congressmen quoted in appellant's opening brief (pp. 25-27) show conclusively that the Land Department's ruling in this respect was opposed to what had up to that time been recognized as the law, and that the Land Department itself had issued patents for land "to the grantee of the locators" where conveyances had been made to such grantee prior to discovery. (See report of Chairman of Public Lands Committee of the Senate, p. 25 Appellant's Opening Brief.) What shall be said of this sudden reversal of practice by the Land Department itself when this court

is urged to accept precedent and long continued rulings of that department as determinative of the issue?

The fact of the matter is that Congress, in justice to the many oil claimants affected by the Bakersfield decision, took this short cut to straighten out a drastic ruling which was opposed to all the announced law on the subject and to the long-established precedent of patenting such claims which the Land Department up to that time had pursued.

The situation was identical with the earlier one which was referred to in our opening brief and where also a patently erroneous interpretation by the Land Department of the mining statutes was made. (pp. 24-25, Appellant's Opening Brief.) There the Department had ruled that petroleum was not one of the minerals contemplated by the mining act. There, as here, Congress passed the curative statute of February 11, 1897, declaring petroleum to be such a mineral. The fact that it was such a mineral was the law both before and after the passage of the act, the Land Department's ruling to the contrary notwithstanding. The Supreme Court of the United States has said so on repeated occasions and commented on the erroneous ruling. *(Union Oil Co. v. Smith,* 249 U. S. 337, 345-6; *Burke v. Southern Pacific Co.,* 234 U. S. 669, 679.) Yet if counsel be consistent they must urge that the Act of Congress of February 11, 1897, passed to cure an erroneous ruling of the Land Department, made new law instead of confirming what was already recognized law.

A study of the March 2, 1911, legislation will convince one that Congress had nothing else in mind than straightening out a most inequitable situation with

reference to oil and gas lands solely, and that most of the Congressmen expressing their views on the subject realized that the law had been generally accepted as contrary to the "new" ruling of the Land Department. The Chairman of the Senate Committee specifically refers to "This *new* interpretation of the law" by the Secretary.

The claim made by appellee (p. 14, Brief of Appellee) that "the failure of Congress to amend a statute after administrative rulings have construed or applied it, constitutes approval of its rulings," is not as broadly supported by the cases cited as the statement quoted would seem to indicate.

The case of *Costanzo v. Tillinghast,* 287 U. S. 341, 345 cited, refers to a consistent construction by the department, which is far from true here where the Land Department up to the date of the Yard decision was issuing patents under similar circumstances. All the court says is that the failure of Congress to amend the law "creates a presumption in favor of the administrative interpretation, to which we should give great weight." What the Supreme Court would have said, if in that case the Land Department's ruling had been contrary to all of the decisions of the courts which have spoken on the subject, and had also been a complete reversal of its own practice in issuing patents under similar circumstances, can only be left to the imagination.

The other cases cited on this point in appellant's brief are to the same effect, viz., that the courts will give weight to rulings of the Land Department, but they do not go so far as to hold that they are to be ac-

cepted as declaratory of the law on the subject when they are opposed to the decisions of the courts.

Appellee suggests that appellant may by making adjoining 20-acre locations of the 80-acre tract in question acquire title to the land in question. (Brief of Appellee, p. 27.) The situation is not as simple as the suggestion would seem to indicate. In the first place appellant would, at considerable expense and without compensating features, have to drill a separate well on each 20-acre location in order to perfect a discovery for each, and in the second place there might be other complications. The suggestion is not practical and would put appellant to unnecessary expense for no good purpose.

Rule of Property-Authority of State courts to decide.

Appellee urges that State courts may not declare a "rule of property" which will be binding upon the Land Department and, as a reason why this should be the law, presents a hypothetical case where a State court may have held a party entitled to a tract of public land and yet the applicant for patent could not enforce such a judgment by the State court and compel the issuance of patent. (pp. 15-17, Brief of Appellee.) Of course this same situation would exist in any of the lower Federal courts which would be without jurisdiction directly to enforce their decrees as against the Secretary of the Interior. But this criticism does not affect the main issue at all. Mere lack of jurisdiction to enforce a decree directly does not make the rule of law announced by the State court any less accurate or controlling. Under such circumstances applicant would apply for a patent and upon refusal by the De-

partment to recognize the "rule of property" correctly announced by the State court would proceed exactly as appellant is proceeding in this case and apply to the proper Federal court for a writ to compel the issuance of patent in accordance with such rule. Counsel's argument merely gives additional emphasis to the necessity for entertaining a proceeding of this sort where misinterpretation by the Secretary of a rule of law will not leave him the final arbiter in such matters and thus placed, as it were, "above the courts."

A similar situation arose in the already-much-discussed Yard case. The Secretary had initiated proceedings against Yard and compelled him to appear and show his right to the public land in question, in spite of the fact that he had not applied for a patent and thus had not voluntarily submitted to the Department's jurisdiction. It was there urged by Yard, precisely as appellee is now urging upon this court, that since the Land Department did not have any power or means of enforcing any decision it might make, it had no jurisdiction to make such decision. This did not prevent the Land Department from proceeding with the matter, recognizing, just as in the case assumed by appellee, that though its decisions might not be directly enforceable, yet indirectly, they may be enforced, just as appellant is urging should be done here. (See *Lindley on Mines,* 3rd Ed. §664, pp. 1659-60.) Counsel urge (pp. 15-20, Brief of Appellee) that the decisions of the State courts are not controlling in cases where an interpretation of federal statutes are involved, and that the Supreme Court of the United States is the final arbiter in such matters and, until it has spoken, the ques-

tion may not be said to be finally settled. We agree with this statement of the law in the main. All that we have urged is that when a State supreme court has flatly decided the question and done so repeatedly, then the Supreme Court of the United States is constrained to look with favor upon such interpretation of the law and has actually done so in the many cases cited in our opening brief. It should be noted in this connection that the *Miller v. Chrisman* decision of this question by the Supreme Court of California took place in 1903, whereas the Yard decision, *contra,* was decided 6 years later in 1909.

The Chrisman v. Miller case.

However, we have the very California case under discussion, taken on appeal to the Supreme Court of the United States and there affirmed, so it is not only a "rule of property" announced by a State court with which we are dealing, but also one which has received the tacit approval of the Supreme Court of the United States. Yet counsel for appellee argue that the rule here contended for by appellant and announced by the Supreme Court of California is not the law, though the question was repeatedly raised and argued in the higher court on that appeal. (Brief of Appellee, pp. 21-29.) Counsel ignore the cases sited at pp. 17-21 of appellant's opening brief, which hold that where the facts are squarely presented to a court on appeal and urged upon that court for determination, the mere fact that the appellate court is silent on the point

> "does not alter the situation, for the question was expressly raised in the case, and was not reserved

> out of the judgment. It must, therefore, be considered as adjudicated therein."

The words quoted are those of Martin, C. J., until recently sitting in this very court. *(U. S. v. Interstate Commerce Com.,* 8 Fed. (2d) 1905.)

Counsel quote from the dissenting opinion of the Chief Justice to the California decision of the *Miller-Chrisman case,* 140 Cal. 452, (Brief of Appellee, p. 21), but they do not note the further fact that though the Chief Justice was the sole dissenter in that case he did not dissent, but concurred, in the subsequent decision of *Merced Oil Co. v. Patterson,* 153 Cal. 624, 630, where the same court re-announced and broadened the rule of the *Miller-Chrisman* case, clearly showing that he had abandoned whatever doubts he had earlier entertained as to the correctness of the main decision.

Counsel state that the *Union Oil Co. v. Smith* (249 U. S. 357) case has no relevancy to the case under consideration. (Brief of Appellee, p. 29.) In that case, as well as in the Chrisman-Miller case, there was directly presented to the Supreme Court of the United States a factual situation, recognized as such by express statement of the facts by the court itself in each instance, to the effect that there has been a prediscovery transfer to an individual of a 160-acre placer mining location by the locators thereof and *yet in each instance the Supreme Court of the United States affirmed judgment for such individual transferee for the entire acreage.* Surely, after its attention had been called repeatedly to this factual situation it is little short of a charge of dereliction of duty to assert that the highest court in the land would thus sit supinely and suffer the law to be so plainly violated as appellee, to be consistent, must

necessarily contend was the situation in both of those cases.

We have printed, as appendix to this brief, extracts from the transcript of the record of the Chrisman-Miller case on file in the U. S. Supreme Court, and regret that full and complete copies of that record are not available for this purpose.

Is mandamus proper under these circumstances?

Appellee's brief takes the position (Brief of Appellee, pp. 31-37) that even assuming that the drastic action of the Secretary depriving appellee of placer ground which it purchased from the original locators in good faith was concededly an error of judgment on his part, nevertheless this may not be questioned in this or for that matter in any proceeding. In other words it is a wrong for which there is no redress. We do not read the authorities as going as far as appellee contends.

Wilbur v. United States, 281 U. S. 206, relied upon by appellee, was a case where trust funds held for the benefit of certain Indians were to be paid out by the Secretary of the Interior on a certain basis involving his determination of the distribution of such funds. The Secretary had to determine whether certain Indians had the status prescribed by the statutes and it is evident that in interpreting these statutes the Supreme Court itself expressed doubt as to the meaning of the language of the statute. Not only did the Court base its decision on the existence of a complex state of facts to which interpretation of doubtful language had to be applied, but it also held that "With the tribe still exist-

ing the criticism by counsel * * * loses much of its force * * *" and concluded by saying "The time fixed for final distribution is as yet so remote that no one is now in a position to ask special relief * * *" etc., (p. 222) thus showing that it based its ruling on other potent grounds as well.

In the case of *United States v. Wilbur,* 283 U. S. 414, also quoted from by appellee, the Supreme Court, in its opinion, expressly states, referring to the provisions of the statute in question:

> "These provisions quite plainly indicate that Congress held in mind the distinction between a positive mandate to the Secretary *and permission to take certain action in his discretion.*"

Quite obviously, taking this view of the statutory provisions which the Secretary had interpreted, the court could not do otherwise than refuse to issue the writ. The placer law we are considering does not give the Secretary any discretion or latitude in his rulings on the question here presented.

The case of *Riverside Oil Co. v. Hitchcock,* 190 U. S. 316, also discussed by appellee, merely holds that when an Act of Congress specifically gives the Secretary of the Interior power to make regulations for carrying out the provisions of that act, an applicant must comply with those regulations if they are reasonable and the Secretary necessarily has discretion in making them. This is utterly different from directly construing the plain terms of an act where no making of regulations and discretion are involved, as is the case here.

The case of *Ness v. Fisher,* 223 U. S. 683, was of similar nature involving administrative details which the

Secretary was authorized by Congress to determine and which were essential to the proper carrying out of the provisions of the statute. The Secretary did not there decide, as he has done here, that applicant was under the plain terms of the statute not entitled to the land in question, but only that he had not complied with the reasonable regulations which the Secretary had in his discretion made.

The Secretary's decision in this case was an arbitrary ruling directly construing the statute in question on a point of law concerning which Congress did not give him any discretion to determine. Here we have solely a question of law to be determined, involving no discretion whatever. The Secretary decided it on the basis of prior rulings of his own, which are opposed basically in their reasoning to the decisions of every court, both Federal and State, which has spoken on the subject. The Secretary has decided it contrary to the results reached by the Supreme Court of the United States in the two cases which have been before it and which all the authorities say determine the question affirmatively even though that court remained silent as far as discussion of the question is concerned. For that reason the *Wilbur v. Krushnic* and similar cases cited in our opening brief (pp. 34-39) are controlling and the writ should be granted.

Respectfully submitted,

WILLIAM E. COLBY,
SAMUEL HERRICK,
PHILIP F. HERRICK,
Attorneys for Appellant.

APPENDIX.

Extracts from the record on file in the United States Supreme Court in Chrisman v. Miller (197 U. S. 313).

The specifications of error as set forth on pages 3 and 4 of the brief of plaintiffs in error are as follows:

"14. The decision of the Court that any person could by location acquire any rights upon the public domain under the mining laws of the United States, which would give him the right by virtue of one marking or one placer location to more than twenty acres in area.

"15. The decision of the Court that Miller could become vested with the rights of his seven associates in a 160-acre tract attempted to be located under the Statutes of the United States as placer mineral ground, it being admitted that there was no discovery of mineral within the boundaries of said 160 acres at any time, and that the seven associates attempted to transfer and convey their alleged interests to the remaining one, and it being admitted and found that there was no discovery until after said seven associates had made said conveyance."

Points 3 and 6 of the contentions of the plaintiffs in error are as follows:

III.

"That the location made by E. O. Miller and others, on December 31st, 1896, was invalid, (a) because it was made at a time when there was a valid subsisting location on the land and at a time when the land was not open to exploration and location, and in consequence no rights whatever were initiated by that location; (b), because it was not based on a discovery and was not perfected by a subsequent discovery made before the rights of others attached to the property; (c), because the

location in fact was made by Miller, Hall and Hannah, who were the only bona fide locators out of the eight persons named in their location, the other five being mere dummies."

VI.

"That the conveyance to Miller upon the 31st day of July, 1897, by his seven associates, being given prior to a discovery of oil, vested no title in him or his lessees and rendered the location invalid at least as to seven-eighths of the land in controversy. In other words, there can be no assignment of the right to locate."

At pages 51 through 54 of their brief the plaintiffs in error discuss the following proposition:

"(b) Location was invalid because it was not based on a discovery, and was not perfected by a subsequent discovery made before the rights of the plaintiffs in error attached to the property."

On pages 63 and 64 of their brief the plaintiffs in error made the following contentions:

VI.

"The conveyance to Miller by his associates upon July 31, 1897, being given prior to any discovery, vested no title in him or his lessees."

"The admitted facts, for the purpose of considering this question, are, that E. O. Miller and W. F. Hall, on the 31st day of December, 1896, went upon the northeast quarter of section 20, township 19 south, range 15 east, M. D. M., and posted a notice of location for themselves and six others named in the notice, and marked the boundaries; that on July 31st, 1897, all of E. O. Miller's co-locators executed a deed to him, in and by which they conveyed, or transferred to him, all their right, title and interest in and to said property under said location.

"*Record,* page 47.

"On the 17th day of September, 1897, E. O. Miller executed a lease of said premises to Frank Barrett, and at about the said time transferred said lease to the Home Oil Company.

"*Record,* page 42.

"The Home Oil Company went upon said premises and commenced boring for oil, and at some time subsequent to September 17th, 1897, struck oil and made the first discovery of oil according to the claims of the defendants in error.

"Therefore, the precise question that is presented to this Court is: *Can there* be any transfer or assignment of a mining location not perfected by discovery? In other words, can there be an assignment of the right to *locate?*"

They argued this point for the next 23 pages, devoting more space to this contention than to any other except their first. Their first contention was that the location made by Barieau in 1895 was a valid location which operated to segregate the land from the public demand and prevented a location being made on the land in question prior to January 1, 1897.

At page 68 of their brief the defendants in error discussed the following proposition:

"The plaintiffs in error are not in position to present to the consideration of the court their contention that the conveyance to E. O. Miller by his associates on July 31, 1897, being given prior to any discovery, vested no title in him or his lessees, which contention is presented under paragraph VI, page 63 of their brief."

The defendants discussed this proposition from two standpoints, (1) that the plaintiffs in error should be treated as intruders and not allowed to raise the question; (2) that the decision of the Supreme Court of

California, under the facts of the case, was correct. Beginning at page 78 of their brief the defendants argued the latter point for 21 pages. Their heading for this argument was as follows:

> "The assumption that the locator of a mineral claim, or an association of eight persons locating a group of eight claims, are trespassers upon, and have no interest in, such mineral claim until the actual discovery of mineral, is far from sustained by the authorities. In fact, the contrary is amply sustained by all of the authorities on this subject."

In their petition for rehearing the plaintiffs in error again raised this point. At page 2 of such petition they argued as follows:

> "To state the point as clearly as we can, it is found by the trial court in the findings mentioned that *without discovery* eight men posted a notice and put up monuments marking the boundaries of 160 acres of public lands on December 31, 1896; that thereafter, on the 31st day of July, 1897, seven of these men conveyed to the eighth, E. O. Miller, and this eighth man, Miller, *still without discovery,* on the 17th day of September, 1897, leased to the Home Oil Company, and the Home Oil Company sunk a well and got a flow of petroleum, and that this well and the oil exuding therefrom *was* the ONLY DISCOVERY upon said lands. Therefore, if the Supreme Court of the United States is right —if section 2320 and section 2331 of the Revised Statutes mean anything—this decision gives to Miller 160 acres of land, when the law says he shall have but 20."